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NOTES

OF

OPINIONS

AND

JUDGMENTS

DELIVERED IN DIFFERENT COURTS,

BY

THE RIGHT HONOURABLE

SIR JOHN EARDLEY WILMOT, KNT.

LATE LORD CHIEF JUSTICE OF THE COURT OF COMMON PLEAS,

AND

ONE OF HIS MAJESTY'S MOST HONOURABLE PRIVY COUNCIL.

LONDON:

PRINTED BY LUKE HANSARD,

AND SOLD BY T. CADELL, JUN. AND W. DAVIES, STRAND.

1802.

12090
W68

97000

Luke Hansard, Printer,
Great Turnstile, Lincoln's-Inn Fields.

ADVERTISEMENT.

Some Apology may be thought neceſſary for the Publication of ſo ſmall a number of Caſes as compoſe the preſent Volume. The fact is, that ſome of them having been handed about in Manuſcript, and having been made uſe of in Court, a ſtrong opinion was expreſſed by ſeveral Gentlemen of the Profeſſion, that, however few in number, they were too valuable not to be made public.

They were certainly not intended by the learned Judge for publication, and ſome of them are not perfect. There is no doubt but they would have been all equally valuable, if they had all received his laſt Correction; and ſtill more, if his modeſty had permitted him to reviſe them with a view to publication. As it is, the Profeſſion and the Public will make allowance for the diſadvantages under which they are preſented to them.

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Page	line	
10.	5.	*for* ſanctified, - - - *read* ſanctioned
98.	11.	*after* in the, - - - - *read* Year Book
113.	1.	*for* . The, - - - - - *read* , the
114.	9.	*for* denied, - - - - - *read* deſired
202.	16.	*for* queritur, - - - - *read* quæriter
261.	23.	*after* made, - - - - - *add (a) and this note at the bottom of the page: (a)* Sir Eardley was at this time in the Court of Chancery, being one of the Commiſſioners of the Great Seal.
271.	20.	*after* Court, - - - - *add (b)*
275.	23.	*for* obliged, - - - - *read* obeyed.

MEMOIRS

OF THE

LIFE

OF

SIR JOHN EARDLEY WILMOT, KNIGHT,

&c. &c.

MEN, who have united talents with ambition, and been eager in the purſuit of power, wealth or honours, are the moſt prominent characters on the great theatre of human life; and if their Country be in proportion benefited by their exertions, the firſt place is undoubtedly due to them in the pages both of Biography and of Hiſtory: yet there is an advantage as well as a pleaſure, in tracing the lives of the modeſt and unambitious, if poſſeſſed, in any eminent degree, of genius, learning, or virtue. This, it is hoped, will be a ſufficient apology for the following pages.

Sir JOHN EARDLEY WILMOT was the ſecond ſon of ROBERT WILMOT, of Oſmaſton in the county of Derby, eſq. and of URSULA, one of the daughters and coheireſſes of ſir Samuel Marow, of Berkſwell in the county of Warwick, bart. His great grandfather ſir Nicholas Wilmot, who was a younger ſon of Robert Wilmot, of Chaddeſden in the ſame county, eſq. (from whom the preſent ſir R. Wilmot of that place is deſcended) was an eminent ſerjeant at law in the middle of the laſt century. Sir Nicholas had two ſons, Robert and Nicholas.

Robert the elder was educated at Oxford, and ſtudied the law at Gray's Inn. He married Elizabeth, daughter, and at laſt ſole heireſs, of Edward Eardley, of Eardley Hall in the county of Stafford, eſq. by whom he had ſeven ſons and one daughter. Robert, the eldeſt, married Urſula abovementioned, whoſe mother, lady Marow, was one of the moſt accompliſhed women of her time: her epitaph *(a)* in St. James's church, Weſtminſter, was written by the memorable Dr. Hough, biſhop of Worceſter, formerly preſident of Magdalen College, Oxford, who lived in great intimacy with all her family. Robert died in 1738, leaving two ſons, Robert and John Eardley, and one daughter, Arabella.

The eldeſt ſon Robert was educated at Magdalen Hall, Oxford, and afterwards ſtudied the Law in the Inner Temple; but he ſoon gave up that profeſſion, and obtained employments under Government,

---

(a) HERE LIES
MARY LADY MAROW,
ONLY DAUGHTER TO SIR ARTHUR CAYLEY, &c.
SHE DIED OCT. 17, 1714, AGED 63.
SHE WAS A LADY OF UNCOMMON MERIT,
AND EXEMPLARY IN EVERY STATE OF LIFE;
RELIGIOUS AND TRULY CHARITABLE, WITHOUT OSTENTATION,
HABITUALLY GOOD AND VIRTUOUS, WITHOUT INTERMISSION,
HER CONVERSATION WAS ALWAYS AGREEABLE AND INOFFENSIVE,
GUARDED WITH PRUDENCE AND QUICKENED WITH GOOD SENSE,
EASY TO THE MEANEST, AND NOT ABJECT TO THE GREATEST,
WHICH MADE HER UNIVERSALLY KNOWN TO AND ADMIRED
BY PERSONS OF THE FIRST RANK, VALUED BY HER EQUALS,
HONORED BY HER INFERIORS, AND BELOVED BY ALL.
SHE HAD A FIRMNESS OF MIND,
WHICH ABUNDANTLY MADE AMENDS FOR
A WEAK AND TENDER CONSTITUTION,
SUPPORTED HER IN ALL EXTREMITIES
TO THAT DEGREE, THAT NO CAUSE OF GRIEF,

NO

ment, which he retained till his death in 1772, when he was about to retire to his ſeat in the country.

John Eardley was born on the 16th of Auguſt, 1709, at Derby, where his father then lived. After having acquired the rudiments of learning at the Free School in that town, under the Rev. Mr. Blackwell, he was placed with the Rev. Mr. Hunter at Lichfield, where he was contemporary with Johnſon and Garrick. It is remarkable that ſeveral eminent men have been brought up at this ſchool; beſide Addiſon and Wollaſton, Johnſon and Garrick, biſhop Newton (who was himſelf of that ſeminary) remarks, that there were at one period five judges upon the bench, who had been educated at Lichfield ſchool, viz. lord chief juſtice Willes, lord chief baron Parker, Mr. juſtice Noel, ſir Robert Lloyd, baron of the exchequer, and Mr. juſtice, afterwards lord chief juſtice, Wilmot.

In January 1724, he was removed to Weſtminſter ſchool, and placed under Dr. Freind; here, and at Trinity Hall in Cambridge, where he

 reſided

NO PAIN OR SICKNESS, COULD EXTORT A COMPLAINT FROM HER:
SHE RESIGN'D HERSELF ENTIRELY TO THE WILL OF GOD,
AND THE SUCCOURS OF HIS HOLY SPIRIT NEVER FAIL'D HER;
SO THAT IN THE WHOLE COURSE OF HER LIFE,
TO THE LAST MOMENT OF IT,
SHE WAS A BRIGHT AND EDIFYING EXAMPLE
OF FAITH, MEEKNESS, AND PATIENCE.

BY SIR SAMUEL MAROW, BART. SHE HAD MANY CHILDREN,
FIVE OF WHOM ARE LIVING,
ANN, MARRIED TO SIR ARTHUR KAYE, BART.
URSULA, MARRIED TO ROBERT WILMOT, ESQ.
MARY, MARRIED TO JOHN KNIGHTLEY, ESQ.
ELIZABETH AND ARABELLA.

FROM THEIR FATHER THEY SHARE A PLENTIFUL INHERITANCE;
AND FROM THEIR MOTHER, WHAT IS INFINITELY MORE VALUABLE,
THE BLESSING OF HAVING BEEN EDUCATED AND FORM'D
AFTER SUCH A PATTERN.

reſided until January 1728, he laid the foundation of many friendſhips, which he preſerved through a long life; and with ſome perſons, who afterwards attained the higheſt offices in church and ſtate; among theſe were Drummond, archbiſhop of York, lord chancellor Northington, and Henry Bilſon Legge, afterwards chancellor of the exchequer, the latter of whom continued one of his moſt intimate friends till his death in Auguſt 1764. At the univerſity, he contracted a paſſion for ſtudy and retirement that never quitted him during life; and he was often heard to ſay, that at this time the height of his ambition was to become a fellow of Trinity Hall, and to paſs his life in that learned ſociety. This natural diſpoſition had induced him to give the preference to the Church; but his father, who was a man of ſagacity as well as reading, had deſtined him to the ſtudy of the Law, which he accordingly proſecuted with much diligence at the Inner Temple, and was called to the bar in June 1732.

In 1743 he married SARAH, daughter of Thomas Rivett, of Derby, eſq. afterwards repreſentative of that borough in parliament. It has been remarked, that biſhop Hough wrote the epitaph of lady Marow, ſir Eardley's maternal grandmother, for whoſe memory he retained a great reſpect, and with whoſe daughters he kept up an uninterrupted correſpondence. As the following letter mentions the marriage of ſir Eardley, and was written by that venerable prelate at the age of 92, a few weeks only before his death, it may not be improper to inſert it here. It is addreſſed to Mrs. Knightley, one of the daughters of lady Marow, and aunt to ſir Eardley; the hand-writing is beautiful, and the contents exhibit an intereſting picture of elegant urbanity in extreme old age, as well as of chriſtian fortitude and reſignation.

" Madam, " 4th April 1743.

" Three months are paſſed ſince you honoured me with a letter, which deſerved my earlieſt and beſt thanks. I had heard of the young

young gentleman's painful indiſpoſition; I felt the concern of a truly affectionate friend, and the notice you gave me of his recovery brought eaſe to my mind; but in good truth I was not then in a condition to tell you ſo.

"A ſevere cold diſturbed me almoſt continually; it allowed me to do nothing but doze away the time in rambling, incoherent thoughts, which was no proper time to addreſs the moſt ſenſible of my friends. I think I have now gotten the better of it, and am eaſy as I was before.

"Thus far I had written, when your moſt obliging letter of March 30th came to my hand, and told me of your kind concern for my welfare. By the mercy of God, I can ſtill ſay that I never am ſick, or feel any ſharp pain; but every day is a great portion of the life that can be expected by one ſo old as I am; and indeed I think I have not many to come. I am much pleaſed that Mr. Eardley Wilmot has choſen a wife, whoſe character you approve; 'tis an argument of his good ſenſe, that he looks not after money in the firſt place; for if God gives him life and health, he cannot fail of making his fortune. I grow weary of my pen, but cannot leave off."

[The biſhop then goes on to mention other ſubjects of a private nature, and concludes]

"Receive this as the laſt letter that is likely to be written by the hand of,

Madam,
Your ſincerely affectionate friend,
and obedient faithful ſervant,
Jo. Worcester." *(b)*

(b) He died the following month, viz. 8th May 1743, in the 93d year of his age, and 53d of his epiſcopate. The following letter from this good biſhop to the ſame lady, Mrs. Knightley, on the loſs of her ſon, a moſt promiſing young man in the flower of his age, Fellow of All Souls College, Oxford, is on a ſubject ſo applicable to many, and ſo intereſting to all, that it is here inſerted.

"Madam,

We are not acquainted with any intereſting particulars of ſir Eardley's life, between the period of his leaving the univerſity and his being in a conſiderable degree of practice as a barriſter; but as duty and filial piety, more than inclination, had induced him to embrace the profeſſion of the law, his purſuit after its emoluments was not

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" Madam,

" I ſhould not have been altogether ſilent upon a ſubject that has ſate heavy upon my own thoughts, much more upon yours, were I not ſure that your better ſenſe ſuggeſts all, and more than I am able to ſay. You know very well, that the true character of a man does not lie in the length of his days, but in the meaſure of his good qualities; and when that meaſure is complete, the Almighty, whoſe eye is always upon him, ſees him fitly prepared for a more exalted ſtate, and graciouſly admits him into it; others advance more ſlowly to perfection, and are ſuffered to have their courſe, as ſome ſorts of fruit are long in ripening, others make haſte to maturity, and both are gathered accordingly. It has of old been ſo frequently obſerved, as to make it proverbial, that the luſtre of thoſe accompliſhments which breaks out to our amazement, when we apprehended it to be only in the dawn, ſhews itſelf in this world but a little while; we gaze and it diſappears. Such people finiſh their part quickly, and with full applauſe the ſcene cloſes upon them: how infinitely valuable are they, above thoſe who in a long ſeries of life never diſtinguiſh themſelves!—theſe laſt are no ſooner out of ſight than they are forgotten, but the memory of the other is immortal. We think doubtfully of ſome that are gone, and uncomfortably of others; but of the good and virtuous we can have none but pleaſing reflections; for will it be allowed a reaſonable cauſe of grief, that one whom I love is promoted out of my reach, to the height of his moſt laudable ambition? Would it be friendly in me to keep him back, and poſtpone his happineſs to my own inclinations? I can eaſily anſwer, No, by no means; I know he is happy, and I rejoice in it; but he is taken from me, his converſation was extremely endearing, and I lament my own loſs: this will not be denied me in a moderate manner; ſome allowance is due to human frailty; but if I carry my grief to exceſs, I muſt bear to be told, that my natural affection is too ſtrong for my *reaſon*, much more for my *faith*. Reaſon, by a thouſand undeniable arguments, is ready to prove, that what cannot be remedied muſt be ſubmitted to with the utmoſt equanimity; and faith, were it lively and active, would open the regions of eternal bliſs, and diſcover thoſe who have been bright examples in this world in ſo glorious a ſtate there, as would animate my hope, abate my regret for their abſence, and invigorate my endeavours to follow them. Who can conceive that tranſport of joy which will attend ſuch a meeting? and how inſignificant will the former ſhort ſeparation then appear! Indeed, madam, there was a time when I poſſeſſed one, who was the deſire of my eyes and the delight of my heart; I reliſhed every

not eager, though his ſtudy of it was unremitted. He was regular in his attendance on the Terms, but his practice was at this time chiefly confined to the county of Derby, where he was much reſpected. In town his buſineſs was not great; yet in thoſe Cauſes in which he was engaged, his merit, learning, and eloquence were univerſally acknowledged, and gained him the eſteem and approbation of ſome of the greateſt ornaments of the profeſſion; among whom were ſir Dudley Ryder, then attorney-general, and the lord chancellor Hardwicke.

In the year 1753, the Chancellor propoſed to make him one of his Majeſty's counſel, and afterwards King's ſerjeant; but both theſe he declined, chiefly from a diſinclination to London buſineſs, and a wiſh, that never left him, of retiring altogether into the country. In a letter written to an intimate friend about this time, on the ſubject of putting his plan of retirement into execution, he ſays: "Conſider it well, and tell me what you think of it; for when I "have once ſtruck the ſail, I cannot ſet it up again; and therefore "it requires a proper conſideration and digeſtion in every reſpect: "One thing I am ſure of, that any change muſt be for the better: "The withdrawing from the eyes of mankind, has always been my "favourite wiſh; it was the firſt, and will be the laſt of my life."

This deliberation terminated in a decided reſolution to retire: and, as the writer was informed by a gentleman who was preſent, he ac-

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thing with her, and nothing without her: we both knew the common fate of mankind, that a parting was unavoidable; it was very often the ſubject of our diſcourſe, and I will not ſay what convulſions attended it; but, I thank God! I had the hope of a Chriſtian, and that ſupported me: And let you and me keep up our ſpirits, in this confidence, that the variable and tranſitory ſtate in which we now live, will ſoon paſs over, when we and our friends ſhall find ourſelves together again, inſeparable, and unalterably happy for evermore!

I am, Madam,

February 2, 1731. Your affectionate and faithful ſervant,

Jo. Worcester."

tually

tually made, in the winter of 1754, what he called his farewell ſpeech in the court of exchequer, which he had of late years attended more than any other. Perhaps his diſpoſition was not calculated for forenſic diſputation, though his profound knowledge and indefatigable labour, as well as ability and penetration, had made him, in the opinion of thoſe who knew him, one of the beſt lawyers of his time. He had more than one offer of a ſeat in the houſe of commons about this period, but he uniformly declined every temptation of this kind.

Having quitted London, with a view to reſide entirely in the country, his reputation for integrity, induſtry, and learning, would probably have brought him as much buſineſs in Derbyſhire, where he was about to ſettle, and in the neighbouring counties, as a provincial Counſel ever poſſeſſed. But Providence meant to place his merit and extend his influence in a ſuperior ſtation. Soon after his retirement, a rumour was brought to him of his ſucceeding ſir Martin Wright, as judge of the court of King's Bench: but as he had never made the remoteſt application, or even hinted, or felt a deſire for the appointment, he did not give the leaſt credit to it, till he received a ſummons to town for that purpoſe.

It required a conſiderable degree of perſuaſion from his friends to induce him to accept this office, which, however honourable, was totally inconſiſtent with his favourite object. Probably the circumſtance of his having five children, the eldeſt of whom was not at that time ten years old, ſeconded the efforts and ſolicitations of his friends.

It is not known to what particular intereſt his promotion was immediately owing; but it may be ſaid, conſiſtently with modeſty, and certainly with truth, that his high reputation, his integrity and profeſſional knowledge, were the primary cauſes of his advancement. At the ſame time, he had already received marks of civility and attention from the great lawyer, who at that time held the firſt ſtation

in

in the profeſſion; and had long been in habits of intimacy and friendſhip with his ſon, the honourable Charles Yorke, with ſir Dudley Ryder, then lord chief juſtice of the King's Bench, and was alſo well known, in his profeſſional and private character, to the late duke of Devonſhire, who was at that time high in the confidence of his ſovereign. This preferment took place in February 1755, and was accompanied, as uſual, with the honour of knighthood. He was ſo unfortunate as to loſe his friend, ſir Dudley Ryder, in little more than a year after his own advancement. Sir Dudley died in May 1756, and left ſir Eardley one of his executors. He was ſucceeded by Mr. Murray, then created lord Mansfield.

In the autumn of 1756, lord Hardwicke reſigned the Great Seal, which was put into the hands of three lords commiſſioners; lord chief juſtice Willes, ſir S. S. Smythe, and ſir John Eardley Wilmot.

In this important ſtation he gave univerſal ſatisfaction; ſo that not a few in the profeſſion, independently of his own immediate friends, thought he would ſoon preſide alone in that court *(a)*. He had now an opportunity of preferring ſome men of merit. Among thoſe whom he appointed commiſſioners of bankrupt, we find the name of Mr. Melmoth, the elegant tranſlator of Pliny's letters, and many of Cicero's choiceſt works *(b)*.

"In

(a) Nor was this without foundation, as appears from the following extract from a letter to his brother, ſir Robert Wilmot, who has endorſed it thus: "18th Nov. 1756, "about his being Lord Keeper."

SATURDAY.

* * The acting junior in the Commiſſion is a ſpectre I ſtarted at, but the ſuſtaining the Office alone, I muſt and will refuſe at all events. I will not give up the peace of my mind to any earthly conſideration whatever. * * Bread and water are nectar and ambroſia, when contraſted with the Supremacy of a Court of Juſtice. * * *

Yours, &c.

E. WILMOT.

(b) Extract from Mr. Melmoth's letter on this occaſion:—

"Ealing, December 6, 1756.

"This favour is ſo much the more valuable to me, as you were pleaſed to confer it before I had an opportunity of making any application for that purpoſe; and I entreat your

In March 1757, ſir Eardley had a moſt providential eſcape from being deſtroyed at Worceſter (while ſitting in court, and juſt beginning to ſum up the evidence) by the fall of a ſtack of chimnies through the roof into court. His firſt clerk, Mr. John Lawes, was killed at his feet; ſome other perſons alſo were killed, and ſeveral very dangerouſly hurt. Moſt of the counſel were gone, and thoſe who remained, got under the great table round which they had been ſitting. Among the counſel preſent were Mr. Aſton, Mr. Nares, Mr. Aſhhurſt, Mr. Skinner, and Mr. Griffith Price, all of whom, it is remarkable, except Mr. Price (who afterwards had a ſilk gown, and was eminent as a chancery counſel) aſcended the bench. The ſafety of the judge was perhaps owing to his preſence of mind and reſignation, in ſitting ſtill till the confuſion was over. This circumſtance has been often told to the writer of theſe Memoirs, by a gentleman who was an eye-witneſs of the ſcene, and could not help obſerving and admiring his compoſure on this alarming occaſion. His own deſcription and ſentiments of it, may be ſeen in the following extract of a letter written to his wife immediately after.

" Worceſter, 15 March, 1757,
" Four in the afternoon.

" I ſend this by expreſs, on purpoſe to prevent your being frightened in conſequence of a moſt terrible accident at this place. Between two and three, as we were trying cauſes, a ſtack of chimnies blew upon the top of that part of the hall where I was ſitting, and beat the roof down upon us; but as I ſat up cloſe to the wall, I have eſcaped

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Lordſhip to do me the juſtice to believe that I have the ſentiments of it, which ſo ſingular an obligation deſerves. If the public do not ſpeak more from what it wiſhes, than what it knows, I ſhall not be premature, if I beſeech your lordſhip to continue the ſame favourable diſpoſition towards me, when the Great Seal ſhall be placed in a ſingle hand; but whatever may be the event, I ſhall always conſider myſelf, &c. &c.

WM. MELMOTH."

eſcaped without the leaſt hurt. When I ſaw it begin to yield and open, I deſpaired of my own life, and the lives of all within the compaſs of the roof. Mr. John Lawes is killed, and the attorney in the cauſe which was trying is killed, and I am afraid ſome others: there were many wounded and bruiſed. It was the moſt frightful ſcene I ever beheld. I was juſt beginning to ſum up the evidence, in the cauſe which was trying, to the jury, and intending to go immediately after I had finiſhed: moſt of the counſel were gone, and they who remained in court are very little hurt, though they ſeem to have been in the place of greateſt danger. If I am thus miraculouſly preſerved for any good purpoſe, I rejoice at the event, and both you and the little ones will have reaſon to join with me in returning God thanks for this ſignal deliverance; but if I have eſcaped, to loſe either my honour or my virtue, I ſhall think, and you ought all to concur with me in thinking, that the eſcape is my greateſt misfortune."

"I deſire you will communicate this to my friends, leſt the news of ſuch a tragedy, which fame always magnifies, ſhould affect them with fears for me."

"Two of the Jurymen, who were trying the cauſe, are killed; and they are carrying dead and wounded bodies out of the ruins ſtill. I will write to you again, &c. &c."

"JOHN EARDLEY WILMOT."

Such was the immediate effuſion from the heart of this virtuous and humble man, on ſo ſudden and awful an event!

The firſt object of his patronage in the church was the Rev. Mr. Shipton, the worthy Incumbent of Oſmaſton in Derbyſhire (where ſir Eardley reſided in the Vacations) who had ſerved that church and two others for a very ſmall ſtipend above thirty years; but this vene-

rable Paſtor, though urged more than once to this effect, declined all preferment which might take him from his beloved flock.

" Far other aims his heart had learn'd to prize,"
" More ſkill'd to raiſe the wretched than to riſe." *(c)*

The Great Seal continued about a year in Commiſſion, when it was delivered to the Attorney General, ſir Robert Henley, with the title of lord keeper.

Sir Eardley returned of courſe to the Court of King's Bench, where he continued about nine years longer, as one of the puiſne judges. The King's Bench was at this time filled with men of diſtinguiſhed talents. Lord Mansfield's high character is too well known to require any

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(c) The following Extracts of the Letters that paſſed between ſir Eardley and Mr. Shipton on this occaſion may not be unacceptable to the reader.

London, 4th April 1757.

Dear Sir,

I hear a Living or two is likely to fall ſoon to my turn; as you always riſe firſt in my thoughts upon that ſubject, and I did not look upon your letters as an actual diſclaimer of any preferment, I ſhould be glad to know your thoughts and wiſhes by return of Poſt; for though I am ſure I cannot make you happier than you are, yet I could not be happy myſelf, if I did not make you a tender of my good offices.

I am, &c.

Rev. Tho. Shipton. JOHN EARDLEY WILMOT.

Sir,

You know that I am intruſted with plurality of Benefices, contiguous and very ſmall in every reſpect; and as I am ſo conveniently ſituated, that I am always at hand to perform divine Offices, and to teach my little flock by my conſtant example as well as doctrine, I may hope that God will accept of this diſcharge of duty from me. The general good of the Church is the principle by which every Clergyman ought to direct himſelf; and to enter upon a remote Benefice, advancing in years and leſs active in life, a Cure on which perhaps I ſhould not chuſe to reſide long, would ſhew more of the lucrative mind than the paſtoral care, and therefore I think I ought to diſclaim it.

I ſhall ever acknowledge, &c.

THOMAS SHIPTON.

This good old man lived to the age of 80, and left his ſavings, about £. 200, to his nieces.

any deſcription or eulogy in this place. He united the peculiar excellencies of Scævola and Craſſus, " Diſertorum juris-peritiſſimus, Juriſperitorum, diſertiſſimus fuit."

Mr. juſtice Denniſon, beſide being converſant with the different branches of his profeſſion, was, in an eminent degree, maſter of the learning of a ſpecial pleader; and ſir Michael Foſter was conſpicuous not only for his profound knowledge of criminal law, but for every quality of an upright, enlightened, and ſagacious Magiſtrate.

It is no ſmall honour to ſir Eardley to have ſat a worthy colleague with theſe three eminent Lawyers and Magiſtrates for ſo long a period. Though the part he took was not a very conſpicuous one, from his ſituation on the Bench and from his native modeſty, yet his Brethren, and thoſe who were acquainted with Weſtminſter Hall during that period, bore teſtimony that his active mind was always engaged, either in or out of court, in elucidating ſome obſcure point, in nicely weighing queſtions of the greateſt difficulty, and in contributing his ſhare towards expediting and deciding the important Suits then under diſcuſſion; nor was he leſs eminent in that important branch of his Judicial Office, the Adminiſtration of the Criminal Juſtice of the Kingdom, both in the ſupreme court of Criminal Juriſdiction, in which he ſat, and on the Circuits, that admirable Inſtitution of our anceſtors, the peculiar and almoſt excluſive enjoyment of this happy Empire. At the ſame time, whilſt his pervading mind ſuffered few Crimes to eſcape detection and puniſhment, his humanity and compaſſion were often put to the ſevereſt trials.

Among many other parts of this laborious profeſſion, to which ſir Eardley had given unremitted attention, is that of taking Notes, and to which he had invariably accuſtomed himſelf both before and after he was called to the Bar; nor had he confined himſelf to any one court, for having only a moderate ſhare of buſineſs in London, he was in general able to attend any of the courts, where there were Cauſes of

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the greateſt expectation. Theſe Notes were tranſcribed by his clerk, and he thus by degrees became poſſeſſed of many volumes of manuſcript Notes, both in Law and Equity. He ſeems indeed to have paid more particular attention to the court of Chancery where Lord Hardwicke preſided, whom he uſed often to call his Maſter, and for whoſe wiſdom and learning he always expreſſed the higheſt veneration. This practice of taking Notes, ſir Eardley continued after he was raiſed to the Bench, till he heard that Mr. (afterwards ſir James) Burrow intended to publiſh his Notes from the time of Lord Mansfield's being appointed chief juſtice. That he at this time deſiſted from taking full Notes of the Caſes, appears from an indorſement in his Note-book in his own hand in Michaelmas 1756, in the following words:

" When I was proceeding to tranſcribe the reſt of my Notes, I heard of Mr. Burrow's intention to publiſh from the time of Lord Mansfield's coming into Court, and therefore ſtopped." But he uniformly lent Mr. Burrow his papers from this period, with ſuch ſhort Notes as he took himſelf.

On the Acceſſion of his preſent Majeſty in 1760, the queſtion of renewing the Commiſſions of the Judges came neceſſarily under conſideration. Some lawyers were of opinion, that by the Act of Settlement, 12 and 13 Will. 3. c. 2.; the Commiſſions of the Judges ought not to determine by the Demiſe of the Crown; but the conſtruction of the Act, and the Practice ſince that period, had been otherwiſe.

His preſent Majeſty however, on his Acceſſion, with that paternal regard for the purity of the Conſtitution in all its parts, which has always actuated his Royal Breaſt from the commencement of his Reign to the preſent moment, declared from the Throne to both Houſes of Parliament, " that he looked upon the independency " and uprightneſs of the Judges as eſſential to the impartial admi- " niſtration of Juſtice, as one of the beſt ſecurities to the Rights

" and Liberties of his Subjects, and as moſt conducive to the " Honour of his Crown; and therefore recommended it to their " conſideration, to make further Proviſion for continuing them in " the enjoyment of their Offices during their good behaviour, not- " withſtanding the Demiſe of his Majeſty, or any of his heirs and " ſucceſſors; and likewiſe that their Salaries might be ſecured to " them during the continuance of their Commiſſions." This was accordingly effected by the 1 Geo. 3. c. 23.

The following are Extracts from ſome Letters that paſſed between ſir Michael Foſter and ſir Eardley on this and other ſubjects.

" Bath, Oct. 28th, 1760.

" I have ſent you the Papers *(d)* I ſpoke of. Pray uſe them with great freedom: read them critically, and give me your opinion of them without reſerve.

" Poſſibly the Judges may be conſulted on a point of Law in which we are all concerned. I cannot ſay but that I have turned the matter over in my thoughts, and have made a few Collections which I cannot now come at. I think the laſt Precedent was a precipitate proceeding, againſt the plain ſcope and intent of the Act of Settlement, and derogatory to the honour, dignity, and conſtitutional independence of the Judges, and of the Crown itſelf. All former Precedents I put out of the Caſe. I found myſelf ſingly on the Act of Settlement and the reaſon of things.

M. Foster.

" Nov. 29, 1760.

" What do the gods of this world, the little part of it we call our Country, do with the Judges? When are their Commiſſions to be renewed?

(d) On the Crown Law.

renewed? Are they to be renewed in the form of the Commiſſions of the laſt Reign, or in ſome other form more conſiſtent with the ſcope and plain intent of the Act of Settlement? Are they to be in fact, "quam diu ſe bene geſſerint," or ſo only upon parchment?

M. F.

"London, March 16th, 1761.

"They talk here of ſome changes. Lord Bute to be ſecretary of ſtate. Lord Holderneſſe to be provided for another way, &c. &c. But changes of this kind do at preſent very little affect me. I am but a paſſenger in the ſhip, and if ſhe be ſteered ſafely into Port, I don't care who has the credit of it.

"I ſuppoſe our Bill goes on as it ſhould; it has been read twice and Committed, and is ordered to be Engroſſed. I knocked yeſterday at * * * and * * * doors, but nobody at home. Our friend is too much embarraſſed at this time; I ſaw him, and had a little diſcourſe with him in the Houſe, the day the King came laſt thither. I was not, at firſt ſight, ſure that I knew him; the penſive ſpot ſits heavy on his brow, and the luſtre of his eye is much tarniſhed. God deliver me and all my friends, from that ſort of Ambition, which ſets a value on any thing which miniſterial connections can give or take away!

Your affectionate, &c.

M. Foster.

"P.S. Before I ſealed my letter, the lord chief baron called on me. He ſays that the maſter of the Rolls, in the Committee, mov'd that the Bill might not paſs as it was brought in, "Enacting," that the Judges Commiſſions ſhould not determine, &c.; but, "Declaring," &c. He ſpoke a great deal upon the ſubject, with ſome reflections upon the memory of the chief juſtice Holt; and ſaid that one of the preſent Judges, not naming him, of whom he ſpoke many kind things,

things, concurred in opinion with himſelf. He was not ſupported by any member, and was anſwered by the attorney and ſolicitor, not without ſome degree of aſperity, eſpecially from the latter.

" Lord Hardwicke tells the chief baron, that if the Bill had been ſent up as a " Declaratory Act," the Lords would have rejected it."

" M. F."

" Bath, May 16th, 1761.

" I brought hither a parcel of Books which I have hardly opened. Watering and airing take up near the whole morning: I ſcribble a little upon memory, but my friends may be aſſured that I do not overdo it.

" My Papers upon Homicide were finiſhed and tranſcribed before I left the Town. But I ſhall weave into them a few hints of what I take to have been the true ſcope and intent of the Statute of Glouceſter, which has puzzled wiſer heads than mine. If I am miſtaken, I cannot ſay, " erro cum patribus;" for I have, with my eyes open, left them to anſwer for themſelves. I ſhall likewiſe touch very ſhortly upon the Recompenſe in the caſe of Homicide, to which the Family of the deceaſed was entitled, and to which the Crown was entitled for the loſs of a ſubject. But as this is in a manner an untrodden path, I ſhall pick my way with fear and caution, and get out of it as ſoon as I can."

* * * * M. Foster."

" 28th June, 1761.

" * * * I herewith return the Papers, which I have read with much pleaſure. They contain a complete ſyſtem of Law upon the ſubject, and I ſee no objection to any part of it.

* * * J. E. Wilmot."

Sir Eardley lived in the greateſt cordiality with his Coadjutors, who ſo frequently conferred with him, and with one another, on the buſineſs that came before them, that they ſeldom failed of being unanimous in their ultimate deciſion, as appears from the Reports of ſir James Burrow *(e)*. Thus did they mutually labour in the cauſe of truth and juſtice, while they were reſcuing the profeſſion of the law, as far as they could, from the imputation of doubt and uncertainty. Unanimity indeed ought not to be purchaſed at the expence of ſincerity; but as there is no doubt of the integrity or abilities of any of theſe learned men, it muſt be acknowledged to have been a very happy circumſtance, that during the whole time they ſat together, there was ſo little difference of opinion on the important queſtions that came before them; important frequently to the public, and always important either to the property, the reputation, the perſons, and ſometimes to the lives of individuals. In the multitude of particulars, concerning which the adminiſtration of Juſtice is converſant, in an ancient Monarchy, like that of Great Britain, and in ſuch an extenſive Empire, both with reſpect to territory and commerce, it requires not only the greateſt abilities, but the moſt indefatigable attention, to apply principles and reconcile precedents, which, in the accumulation of ages, may appear, at firſt

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(e) Sir James Burrow ſays, in his 4th vol. page 2582, "It is remarkable that, excepting this caſe (namely, Perrin and Blake) and another, there never has been, from the 6th of November 1756, to the time of the preſent publication, viz. May 1776, a final difference of opinion in the court in any caſe, or upon any point whatever. It is remarkable too, that, excepting theſe two caſes, no judgment given during the ſame period has been reverſed, either in the exchequer chamber, or in parliament."

It has ſince been attempted to controvert this poſition of ſir James Burrow, and to ſhew that ſir M. Foſter differed in opinion with his brethren on the bench in other caſes than thoſe mentioned. But it may be obſerved, that ſir James does not aſſert that there were no differences of opinion between the judges of this court, at the commencement, or in the progreſs of the various ſuits which came before them during this period: His aſſertion is confined to their "final difference of opinion in court."

ſight, contradictory to each other. This requires great induſtry and perſeverance, as well as great parts and learning; and it was probably to an union of theſe qualities, that this agreement of opinion was principally owing. At the ſame time it muſt be acknowledged, that ſuch is the diverſity of caſes and of circumſtances, to which laws may be applied, that a difference of opinion may, as it ſometimes does, ariſe between the wiſeſt and ableſt men, without any impeachment of their integrity, their abilities, or their induſtry.

His intimacy with lord Mansfield continued many years after ſir Eardley quitted that court; and there were few queſtions of magnitude agitated in the court of King's bench, on which that noble lord did not confer with ſir Eardley Wilmot. With ſir Michael Foſter the moſt cordial friendſhip ſubſiſted till his death in the winter of 1763, aged 74, when ſir Michael bequeathed him three volumes of Prynne's works, in the following words: "To my honoured Friend "and Brother Mr. juſtice Wilmot, Prynne's Records, three Volumes, "and his Parliamentary Writs; which I deſire he will accept, as a "mark of the ſincere eſteem I have for a Gentleman of his merit."

In December 1763, ſir M. Foſter was ſucceeded by ſir Joſeph Yates, a man univerſally eſteemed for his abilities, integrity, and learning. With him ſir Eardley ſoon became united in the bands of indiſſoluble friendſhip, their attachment to each other increaſing every year with their more intimate acquaintance.

In autumn 1765 died ſir Thomas Denniſon, on whom lord Mansfield conferred the ſingular honour of writing his Epitaph, which is believed to be the only work of the kind that came from his hand *(f)*.

Thus, though various had been, in this interval, the revolutions of Party in the State, and many the changes occaſioned by the

(f) This appears from a Note of the noble lord to ſir Eardley; and which the Editor communicated to the late John Holliday, eſq. when he was writing the Life of that eminent Lawyer and Magiſtrate.

Acceſſion of a new Monarch to the Crown of Great Britain, the perſons who adminiſtered Juſtice in this court, on ſir Eardley's elevation to the Bench in 1755, continued, with little variation, for ſeveral years.

It is one of the greateſt advantages which the courts of Law have over the court of Chancery, that they are not affected by Changes in the Adminiſtration of public affairs. It may be very proper that one great Law-Officer ſhould have a ſeat in the Cabinet, and be always at hand, to adviſe his Majeſty's Miniſters on important ſubjects of Law and the Conſtitution; but it is very fortunate that this is not the caſe with the venerable Magiſtrates who preſide in our other courts of Juſtice: they are thus kept free from the imputation of political bias, and have alſo more leiſure for the laborious duties of their Station. This was frequently an obſervation of ſir Eardley's, and no ſmall conſolation to him, both whilſt he continued in the King's Bench, and when he afterwards preſided in another court. But, though he perſevered unremittingly in the diſcharge of his duty, it was not without a frequent ſigh for a more quiet and retired ſtation than that of the court of King's Bench. In 1765, a ſerious treaty was ſet on foot by him to exchange that honourable office for one, not leſs honourable indeed, but undoubtedly at that time leſs lucrative and leſs conſpicuous, that of Chief Juſtice of Cheſter, which was then held by Mr. Morton; but the treaty was at length broken off *(g)*.

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(g) Extract from Mr. Morton's letter to him, on his promotion to the chief juſticeſhip of the Common Pleas in 1766.

" My Lord, Flint, 22d Auguſt 1766.

" Laſt Poſt gives me, I hope, authentic ground to addreſs you as above, and to make you my moſt ſincere congratulations on your promotion to the Chief Seat of the Common Pleas.—If I was not unwilling to ſtagger you in your firſt Judgment, I would certainly lay in my claim for half of your preſent Office. I have at leaſt the ſame pretenſions which Cibber ſet up to the Tranſlation of the Iliad.

" Had

When lord Camden, who had been Chief Juſtice of the Common Pleas about four years, was appointed lord chancellor in the Summer of 1766, ſir Eardley had the offer of the Chief Juſticeſhip of that Court. It is believed, that next to his character for learning and integrity, he was indebted for this offer, to the high opinion and eſteem of both the old and new chancellor, and alſo to the friendſhip of lord Shelburne, appointed at that time one of the Secretaries of State. His lordſhip, though a much younger man, had ever ſince his firſt acquaintance with him, ſeveral years before, conceived ſo great an admiration of his talents, and eſteem for his virtues, that he had long lived with him in habits of the greateſt intimacy and friendſhip.

The following is an Extract from a Letter on this ſubject to ſir Eardley, from an intimate friend.

" 2d Auguſt 1766.

" The Curtain is now drawn up; the Actors are coming upon the Stage. I underſtand you have a part, which, though not your own choice, has been aſſigned to you in ſo diſtinguiſhed, ſo honourable a manner, that you certainly ought, cheerfully, graciouſly, and gratefully, to accept it. 'Tis a Duty which you owe to the King, to your Friends, to your Family, to yourſelf; and the Duty required is neither hard nor unprofitable.

" I have ſeen —— to day, from whom I find that lord Camden claims the ſole merit of your advancement: however, it is not impoſſible

" Had I indulged your offer of an exchange for my preſent ſtation, what would have been your lot? Hearing a Welch Action for words, not more honourably attended than the firſt figure of a Puppet Shew; or in your happier hours, viewing a muddy tide coming in at Flint. From this picture, your lordſhip need not look for the Venue of this Addreſs, nor have any doubts of my veracity, when I aſſure you, that I have not been ſo well pleaſed theſe three weeks, as in having this occaſion of aſſuring you how ſincerely I am,

" My Lord,

" Your moſt, &c. &c.

" JOHN MORTON."

poſſible but that lord Shelburne's friendſhip for you may have had its weight: Lord Northington has likewiſe probably promoted the meaſure; and what is more extraordinary, the two Law Peers have done it under an entire conviction, as * * * ſays, of your attachment to another Chief * * * * *. Their motive is your eminent abilities in your profeſſion, your extenſive knowledge, your acute and deep penetration, your ſound judgment, your principles in favour of liberty, your unſpotted character, and your being, in every reſpect, the moſt fit and proper perſon for that ſtation. It may have croſſed them all, from alpha to omega, that ſuch a choice would give univerſal ſatisfaction, not only in Weſtminſter-hall, but throughout the whole kingdom, and thereby add credit and popularity to the new Adminiſtration: I ſhall only obſerve, that you come in without terms, conditions, ſtipulations of any kind. It is preſumed you will do your duty, (and nothing more is required) and always, when called upon, give your opinion and advice in Council according to the rectitude of what ſhall be propoſed, and not with a certain miniſterial warp, which ſcandaliſes the Man; upon the whole, I am clearly of opinion, for many material reaſons, that your remove to the Common Pleas, will be a fortunate and happy event. You will, at all events, be a permanent pillar, though the new Miniſtry, as it probably will, topple down; when the ball comes to be toſſed up again, as every body thinks it muſt, and a new match played, the lame ones muſt lag behind. One ſet of men are thoroughly united; another, whom artifice has ſevered and ſet at variance, may now, and will, if they be not infatuated, piece again; and the numbers and ſtrength of the new-comers, do not ſeem ſufficient to carry away the ball from both. Lord Northington —— the duke of Grafton hates buſineſs, and will ſoon be weary of the Treaſury. Charles Townſhend thinks himſelf injured by having the Chancellorſhip of the Exchequer crammed down his throat * * * *. In ſhort,

ſhort, the City have brought in their Verdict already, "Felo de ſe "againſt William earl of Chatham!"

* * * Yours, &c."

A few days after, he received the following Letter from lord Camden.

"5th Auguſt 1766.

"I have the King's Orders to acquaint you with his intention of removing you to the Chief Juſticeſhip of the Common Pleas, if it be agreeable to you. As Mr. Morton is not yet determined to yield up to you the Chief Juſticeſhip of Cheſter, I would adviſe you to repoſe yourſelf in the Common Pleas 'till that deſired event happens: I aſſure you it is a place of perfect tranquillity. I do moſt ſincerely congratulate you on this nomination. I have been under a treaty with * * * * * * ever ſince I came to Town, the particulars of which you ſhall know when you come: It is now ſuſpended till you arrive—I have withſtood his bribe, being determined never to defraud my ſucceſſor upon my death bed: his neceſſities are extreme as well as my punctilio, and I doubt they can never meet: however it is now in your hands rather than in mine; for I do not conſider myſelf any longer in Conſcience, though I am in Law, Chief Juſtice of the Common Pleas."

"I am with great truth, &c.

"CAMDEN."

Sir Eardley was at this time on the Weſtern Circuit with ſir Joſeph Yates, to whom he communicated the purport of the Letter he had received from lord Camden, at the ſame time expreſſing his intention to decline the unſolicited honour that was offered him, chiefly on account of his health, and the deſire he had long felt of retiring from public buſineſs: ſir Joſeph was much ſurpriſed and affected with this declaration; and after endeavouring to perſuade him to a different

different conduct, retired to reſt, without making any impreſſion on ſir Eardley, who read to him the anſwer he had written to the above purport, and which he intended to ſend the next morning. Sir Joſeph's friendly boſom, however, could take no reſt when the intereſts of his friend and his family were, as he thought, ſo deeply concerned. He roſe very early in the morning, and went to his friend's chamber with another Letter in his hand, whic hhe at laſt prevailed upon ſir Eardley to copy with very little alteration. He accordingly ſent the following anſwer, ſtating his increaſing infirmities, but ſubmitting, with reſpect and gratitude, to his Majeſty's pleaſure.

" Briſtol, 9th Auguſt 1766.

* * *

" Your Lordſhip may imagine the pride I muſt feel from ſo eminent a mark of the Royal favour; but before theſe gracious intentions are carried into execution, I think it my duty to lay before the King the true ſtate of my health, that his Majeſty may judge whether a mind, ſo allied, is fit for his ſervice in ſo important an office. I have long apprehended the approach of ſomething paralytic; but doctor Huxham of Plymouth, whom I have lately conſulted, conjectures that my diſorder is rather ſtone in the kidneys. What my real caſe may be is at preſent uncertain; but I ſhould become very unhappy indeed, if after ſo diſtinguiſhed an inſtance of his Majeſty's favour, my infirmities ſhould render me unequal to the taſk, and make me an occaſion of repentance to the King for the only error in the Appointments he has made.

" Your Lordſhip's conduct with reſpect to Mr. * * * is extremely delicate and honourable, and I ſhall concur in any meaſure which your lordſhip approves, that may beſt accommodate the neceſſities of his family, without expecting or wiſhing for the leaſt advantage from it.

" Lord

" Lord Northington's Reſignation gives me the pleaſure of congratulating with the public on your lordſhip's promotion, which redounds ſo much to the honour of the crown, and affords ſuch univerſal ſatisfaction, &c. &c.

" E. WILMOT."

The Office which ſir Eardley was going to decline, though of greater emolument and of higher rank in the profeſſion, was leſs laborious than that he would have retained; but, without the friendly interpoſition abovementioned, the very circumſtance of its high rank was a ſufficient reaſon with him to decline it, as it would naturally call him forth more into public view, which was what he wiſhed moſt to avoid.

In the evening of the day ſir Eardley kiſſed hands on being appointed chief juſtice, one of his ſons, a youth of 17, attended him to his bed-ſide. " Now," ſays he, " my ſon, I will tell you a ſecret " worth your knowing and remembering; the elevation I have met " with in life, particularly this laſt inſtance of it, has not been " owing to any ſuperior merit or abilities, but to my humility, to my " not having ſet up myſelf above others, and to an uniform endea- " vour to paſs through life, void of offence towards God and man."

Congratulatory letters are generally the effuſions of the moment, and are ſeldom worth preſerving: the following to ſir Eardley are ſelected out of a great many, more on account of the celebrity of the Writers, than the importance of the occaſion.

" Dear Sir,

" I have the honour of your letter of the 19th inſtant, with your acknowledgments for the juſtice I have done you in my teſtimony of your merit to our moſt gracious and amiable Sovereign. It ſuits yourſelf to give them to me; it becomes me to tell you, that your learning, capacity, and character made it my Duty, which you

politely call friendſhip. In all other reſpects, I can ſubſcribe myſelf your ſincere friend, and moſt obedient, &c.

"NORTHINGTON."

24th Auguſt 1766,
Grainge.

"Dear Sir, "Tittenhanger, Aug. 11th, 1766.

"I know not whether you are yet Chief Juſtice of the Common Pleas in form; but give me leave to congratulate you and the Public on your advancement. The kind and uniform Friendſhip which you have ſhewn me, makes me feel a real pleaſure on this occaſion * * *.

"I have ſeen * * * * * to whom I have ſaid ſome things which he will repeat to you in confidence. The reſt I will reſerve till I ſee you either in town or country.

"Dieu vous conſerve dans ſa ſainte garde, et moi dans votre amitié.

"Ever yours, &c.

"C. YORKE."

"My Lord, "Stourhead, Aug. 9th, 1766.

"I cannot help troubling your lordſhip with a few lines to expreſs my hearty joy at your being advanced to a ſtation, which will make your virtue and abilities of ſtill more uſe and benefit to your country. Do me the juſtice to believe that none of your friends can more ſincerely take part in the ſatisfaction of the public on this promotion than,

"My dear lord, &c.

"LYTTELTON."

" Wallingford, 26 Aug. 1766.

" My Lord,

" Among the many congratulations you receive upon a promotion which every body is pleaſed with, even in theſe times of diviſion, there are none more ſincere than thoſe which come from your lordſhip's acquaintance, who have an opportunity of contemplating your private as well as public character. As your lordſhip has been pleaſed to honour me with that advantage, in a degree that has laid infinite obligations upon me, you will believe that it is with real pleaſure I felicitate both your Lordſhip and Weſtminſter-hall, on an event that does honour to them both.

" I am, &c.

" W. Blackstone."

" Prior Park, 13th Sept. 1766.

" My Lord,

" I had long ago given over expecting any good from public changes when the papers informed me of your lordſhip's promotion.

" Fortune ſeemed to proceed here as in claims in law—willing to keep up the memory of an old title, " that which ſuperior merit once had to ſucceſs." But whether we are indebted for this to one of Fortune's lucid intervals, or to the caprice of one of her favourites, it cannot but give real pleaſure to all who love their country; as well to thoſe who have not the honour of your friendſhip, as to thoſe who have. I, who am without any other pretenſions to this honour than a deſire to deſerve it, have not only a ſhare in this general ſatisfaction, but all the warm ſenſe of it, which

your friends can feel, being, in truth, with the utmoſt regard and eſteem,

" My Lord, &c.

" W. GLOUCESTER."

Thus was ſir Eardley called upon to preſide in a Court where he had many ſeniors on the bench. The appointment gave general ſatisfaction, and his acknowledged abilities, his unaffected modeſty and courteſy, ſoon made him as much eſteemed and beloved in his new court, as he had before been in his old one. He had this peculiar good fortune, or rather peculiar merit, that with whomſoever he was connected in public or private life, he not only lived on terms of civility and reſpect, but of cordiality and friendſhip; ſo that he was equally admired for his abilities, eſteemed for his integrity, and beloved for his ſocial virtues. Perhaps the being totally void of ambition himſelf, might peculiarly fit him to be the common friend of thoſe who were ſenſible of his diſintereſtedneſs, and with whom therefore he could have no competition. This may in ſome degree account for his living in habits of friendſhip with perſons very oppoſite in their political principles, with lord Mansfield and lord Shelburne, with Mr. Yorke and Mr. Pratt. Beſide theſe, and others already mentioned, he numbered lord Lyttelton (who frequently conſulted him on the legal part of his hiſtory of Hen. II.) lord Huntingdon, lord Hardwicke, lord Dartmouth, doctor Ryder, archbiſhop of Tuam, (to both of whom he had the honour of being allied) ſir T. Parker, the venerable ſir Edward Wilmot *(h)*, Mr. baron Adams,

(h) Grandfather of the preſent ſir Robert Wilmot of Chaddeſden near Derby, baronet: He was phyſician to the late king, and to the prince of Wales, father of our preſent beloved ſovereign.

He retired from buſineſs on the acceſſion of his preſent Majeſty. After having reſided ſome years at Nottingham, and having, at the age of ſeventy-ſeven, found that climate rather

Adams, Mr. Harris of Salisbury, Mr. D. Barrington, Mr. Wilbraham, Mr. Forrester, and many others, distinguished either for their abilities, learning, or virtues, amongst his intimate friends and warm admirers. These were friendships contracted chiefly in the meridian of his life. With Mr. Legge and Mr. Yorke *(i)* he had lived in habits of the greatest intimacy from an early period of it, nor did it end but with their lives.

In 1768, bishop Warburton founded a lectureship on prophecy, and requested sir Eardley to be one of the first Trustees, in the following letter:

" My good Lord, Prior Park, March 9, 1768.

" I am about fixing in my life-time a small Theological Lecture at Lincoln's Inn, and that Society not being incorporated, I have a good pretence to put it into the hands of Trustees *(k)*, who are to chuse their successors. I shall be glad to be honoured with the names of lord Mansfield, yourself, and Mr. Yorke, as those of my own appointment, and have applied to them for this leave, as I now do to your Lordship; I presume that one or both of them may have acquainted you with my project, and, on that presumption, will conclude that I have the honour to be, with the highest regard and attachment,

" Your Lordship's most faithful, &c.

" W. Gloucester."

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rather too cold for his years and constitution, he went, as he said, to spend the remainder of his days with his daughter-in-law, Mrs. Williams, at Heringstone near Dorchester: he corresponded with the writer of these sheets, with all the vigour and sprightliness of youth, till within a few months of his death in 1786, at the age of ninety-three.]

(i) In an elegant edition of Cicero is the following inscription, in sir Eardley's hand writing:

" The Gift of the Honourable Charles Yorke,"
" Quem tu, dea, tempore in omni
" Omnibus ornatum voluisti excellere rebus."

(k) Bishop Hurd says in his Life of Bishop Warburton, " He was anxious to have this " important Trust in the best hands."

His

His intimacy with this learned divine encreaſed much after this period, and in 1769, ſir Eardley requeſted his aſſiſtance and advice on the occaſion of one of his ſons preparing himſelf for the Church, which the Biſhop complied with, by ſending him the "firſt" part of ſome Directions for the ſtudy of Theology, accompanied with the following letter.

"My good Lord, March 1770.

"The encloſed aims at doing ſome little pleaſure to your ſon, who, I truſt, will hereafter prove one of the greateſt ornaments of his profeſſion.

"But it was but fit, that your Lordſhip, who is ſo much intereſted in his welfare, and is ſo excellent a judge in all that relates to literature ſhould firſt ſee it, that it may undergo your correction and amendment.

"I have the honour, &c.

"W. Gloucester."

Circumſtances afterwards induced his ſon to go into the profeſſion of the Law; on which ſir Eardley, in the year 1771, made the following indorſement on the Biſhop's paper.

"Theſe Directions were given me by Dr. Warburton, biſhop of "Glouceſter, for the uſe of my ſon, when he propoſed to go into "orders; but, in the year 1771, he unfortunately preferred the Bar "to the Pulpit, and, inſtead of lying upon a bed of roſes, ambi-"tioned a crown of thorns."

"Digne puer meliore flammâ!"

This is mentioned chiefly to ſhew how uniform ſir Eardley was, from his earlieſt youth, in his predilection for the Church, a predilection which probably influenced, more or leſs, every act of his Life.

Some years after the biſhop of Glouceſter's death, doctor Hurd, ſince biſhop of Worceſter, called upon ſir Eardley's ſon, who delivered to him the MS. in order that it might be inſerted in a volume of the biſhop's poſthumous Works, ſince publiſhed. It is only to

 be

be lamented, that the learned Prelate did not execute the "ſecond" part of this work.

It was about this time, viz. 1769, that ſir Eardley preſided in the memorable Cauſe of Mr. Wilkes againſt lord Halifax and others, a period of great heat and violence, both in parliament and in the nation; but he was ſo entirely free from all political bias, that his conduct gave univerſal ſatisfaction. It was an Action of Treſpaſs for falſe impriſonment, damages laid at £. 20,000, Mr. Wilkes having been taken up and confined in the Tower, and his papers ſeized and taken away, by virtue of a General Warrant *(l)* from lord Halifax, one of his Majeſty's Secretaries of State.

(l) As the ſubject of General Warrants was much diſcuſſed at the time, though now at reſt for ever, it may be proper to inſert a copy of it.

GEORGE MONTAGU DUNK, Earl of Halifax, Viſcount Sunbury, and (L. S.) Baron Halifax, one of the Lords of his Majeſty's moſt Honourable Privy Council, Lieutenant General of his Majeſty's Forces, and Principal Secretary of State, &c.

THESE are in his Majeſty's name to authorize and require you (taking a conſtable to your aſſiſtance) to make ſtrict and diligent ſearch for the authors, printers, and publiſhers of a ſeditious and treaſonable paper, intitled, the North Briton, Number XLV. Saturday, April 23d, 1763: printed for G. Kearſley, in Ludgate Street, London, and them or any of them having found, to apprehend and ſeize, together with their papers, and to bring in ſafe cuſtody before me to be examined concerning the premiſes, and further dealt with according to law. In the due execution whereof, all mayors, ſheriffs, juſtices of the peace, conſtables, and all others his Majeſty's officers, civil and military, and loving ſubjects, whom it may concern, are to be aiding and aſſiſting to you as there ſhall be occaſion. And for ſo doing this ſhall be your Warrant. Given at St. James's the Twenty-ſixth Day of April 1763, in the Third Year of his Majeſty's reign.

DUNK HALIFAX.

To Nathan Carrington, John Money, James Watſon, and Robert Blackmore, four of his Majeſty's Meſſengers in ordinary.

The

The following is the ſubſtance of what the learned Judge ſaid in his charge to the Jury.

" The form of the Declaration, is for breaking and entering the Plaintiff's dwelling houſe, breaking open his locks and doors, deſtroying his cabinets, boxes, &c. taking away his papers and converting them to their own uſe; for aſſaulting the Plaintiff, and ſeizing and impriſoning his perſon ſeveral days in the Tower: but the ſubſtantial part of this Action, is for taking his perſon and papers without legal Authority. Now there can be no doubt whatever, but that the impriſonment of his perſon and the ſeizing of his papers was illegal; becauſe there is no doubt but that the Warrant, whereby the Plaintiff was impriſoned and his papers ſeized, was illegal; it has undergone the conſideration of this court, and likewiſe of the court of King's Bench, and has very properly been deemed ſo by every Judge who has ſeen it; and there is no pretence or foundation for the Defendant in this Cauſe to make any ſtand againſt this Action by way of Juſtification in the way he has done; becauſe it clearly and manifeſtly is an illegal Warrant, contrary to the Common Law of the land; and if Warrants of this kind had been found to be legal, I am ſure, as one of the Plaintiff's Counſel obſerved, it is extremely proper for the Legiſlature of this kingdom, to interpoſe and provide a remedy; becauſe all the private papers of a man as well as his liberty, would be in the power of a Secretary of State, or any of his ſervants. The Law makes no difference between great and petty Officers. Thank God, they are all amenable to Juſtice, and the Law will reach them if they ſtep over the boundaries which the Law has preſcribed.

" But though this Warrant is illegal, yet it appears from the Evidence, that it was not of the Defendant's own original framing; it was in conformity to many Precedents in the Secretary of State's office from the time of the Revolution."

The

[The Precedents were then read, about forty in number, and many more were produced: the Evidence was ſtated, and the Proof referred to, that the Plaintiff had obtained a Verdict of £.1000 againſt Mr. Webb, for the ſeizure of his Papers. The learned Judge then proceeded.]

" The purpoſe of bringing this Evidence is to endeavour to take off the imputation of malice, and to ſhew you, that it was not done without Precedents; and that, if it was wrong, it was at leaſt a precedented miſtake.

" Now, in the firſt place, it appears moſt clearly, that the Plaintiff has been taken up unlawfully, has been impriſoned ſeven days, has had his papers ſeized, examined, and rifled; that theſe papers have been likewiſe improperly and illegally taken notice and made uſe of; and by the letter that has been read to you, it appears, that ſuch of them only were to be returned, as could not tend to prove the Charge againſt him. As to the Declaration of breaking locks and doors, theſe are only formal words; and in aſſeſſing the damages, you are not particularly to direct your attention to them; the ſpirit of the thing is for the unlawful impriſonment of his perſon ſeven days, and unlawfully ſeizing his papers; and there is no doubt but that there has been a plain and groſs injury done him, which is likewiſe a plain and groſs violation of the Laws.

" The manner of doing it is alſo proper to be conſidered. It has been proved to you, that there was an Order in the Warrant, directing him to be kept " cloſe" priſoner; it appears that it has been uſual to inſert theſe words, " cloſe confinement," even for Libels; but the Warrant was accompanied with a verbal Order, given, not by the Defendant, but by lord Egremont, that nobody ſhould be admitted to ſee the Plaintiff, which is a thing extremely unlawful. It muſt be obſerved, however, that as ſoon as it was known, his friends were not to ſee him, Mr. Webb endeavoured to rectify it; he got

the verbal Orders relaxed, and ſent word that the Plaintiff's friends might ſee him.

"Another thing has been mentioned and inſiſted on, which is, the change of cuſtody; but I own there does not appear to me the difference which is contended for. When the Plaintiff was taken up, a Habeas Corpus was applied for; but then it was applied for improperly. It does not appear that the Secretary of State knew of it, before the Warrant for ſending the Plaintiff to the Tower was prepared and ſigned: there was ſome rumour about it, but the Secretaries of State did not know it; and I do not ſee that any thing has been proved like an intention to oppreſs the Plaintiff. I never give myſelf the liberty either to enforce or explain away words, but ſtate them to you preciſely as they were uſed. You are to conſider the Evidence, and to judge whether you think the cuſtody was changed by the Secretary of State with an intention to oppreſs the Plaintiff; if ſo, it would, undoubtedly, be a great aggravation of the illegal treatment. But, upon my oath, I cannot ſay I ſee any intention of ill uſage; there does not ſeem to me to be any aggravation ariſing out of this matter; on the contrary, Mr. Stanhope, one of the Witneſſes, ſwore, that the Plaintiff ſaid the Defendant behaved like a Nobleman, and that he ſhould always regard him for it.

"There is another thing I muſt mention to you—that no prejudices of whatſoever kind ſhould influence you. It is my opinion, that you all come here as unprejudiced and diſpaſſionate to try this Cauſe as I myſelf do; and therefore all things ſaid out of doors, all papers and pamphlets, are to be totally laid out of the minds, both of Judge and Jury: they muſt be deaf, dumb, and blind, to every thing but the Evidence before them; they muſt diveſt their minds of every thing that might have a tendency to influence them. Gentlemen, I ſpeak for myſelf as well as for you: I never read any thing about what may come before me in a court of Juſtice; I keep my mind free from every thing of the kind. There is often a neceſſity for me to

look into the Law; but I never ſuffer my mind to be biaſſed by Reports, or ſuch papers or pamphlets as are written with a view to pervert Juſtice.

" Much has been ſaid on both ſides, which does not particularly apply to this Cauſe.—But it is the Evidence, and what ariſes neceſſarily and immediately from the Evidence, upon which you are to form your Judgment.

" You all very well know what deference I always pay, and ever will, to that part of the office of a Jury which properly belongs to them. In regard to the Law, I have always been as tenacious of the proper function of a Judge, as I have been of that of the Jury. I never will, while I have the honour of executing the office of a Judge, attempt to controul or influence their minds in reſpect of Damages; but only ſubmit to them ſuch Obſervations as occur to me upon the Evidence; and as the gentlemen at the Bar have induſtriouſly avoided pointing at any particular Sum you ſhould give, I will as induſtriouſly avoid pointing at it too, and leave it for you to determine as you ſhall think proper. In regard to Facts, you are to take all the circumſtances of this Caſe into your conſideration; and when a Special Jury of the firſt rank in the country appears, there is leſs neceſſity for a Judge to deſcant upon the nature and circumſtances of a Cauſe, than there is to an inferior rank of men, perhaps not ſo well acquainted with, nor ſo well qualified to balance, ſuch a Cauſe as this.

" This Warrant being clearly unlawful, you will conſider of the Damages. If the Defendant had ſet up this Mint, and had firſt invented and coined this Warrant, it would certainly have been a prodigious aggravation; but you ſee from the Evidence, that the office has been in the habit and practice of granting theſe Warrants from before the Revolution to this time: they have been iſſued in the meridian of this Conſtitution by its beſt friends and the greateſt lawyers, and have never before undergone any animadverſion;

and therefore whatever error this gentleman has been guilty of, he has erred with all the Secretaries of State from that time. There is not the leaſt foundation to preſume any evil deſign in the Defendant againſt the liberties of the People. The Secretaries of State are not bred to the Law, and it would be an act of injuſtice to conſider a precedented miſtake, as a tyrannical, depraved, corrupt act of Oppreſſion; and you find from the Evidence, that they applied, from time to time, to the Lawyers of the Crown; and when ſome queſtion aroſe about the Warrant, and a Warrant was propoſed with Mr. Wilkes's name in it, it was oppoſed by the Solicitor of the Treaſury, who ſaid, "this is the courſe of office, it has been approved of by "the Crown Lawyers, and I cannot conſent to any innovation."

"But however this Proceeding might be in the courſe of office, and however precedented, it was certainly illegal; you muſt therefore find a Verdict for the Plaintiff, and give him ſuch damages as under the circumſtances of this Caſe you are of opinion he is entitled to. I will go further, and ſay, that you are not to confine yourſelves ſtrictly to the impriſonment of ſeven days, and the mere ſeizing of his papers; but you ſhould give "liberal" damages; by "liberal," I do not mean "exceſſive." "Exceſſus in Jure reprobatur." The Law always condemns exceſs; it muſt be within the rules of Reaſon: the circumſtances of the Caſe are to govern it, and as nearly as you can, you will give that Satisfaction and Compenſation, which may bear a proper proportion to the Injury and to the nature of the Injury received, under all its circumſtances."

This account is chiefly taken from the Publications of the day, and probably contains only an imperfect ſketch of the learned Judge's Addreſs on this occaſion. The Jury brought in a Verdict for the Plaintiff, damages £. 4000.

Beſide the ordinary, but important buſineſs of the court of Common Pleas, it falls to the Chief Juſtice of that court (as the Chief

Chief Juſtice of the King's Bench is generally a Peer), if he is not a Peer himſelf, to give the Opinion of the Judges in Appeals to the Houſe of Lords from the court of Chancery or Writs of Error from the court of King's Bench, and the Exchequer Chamber. He is alſo frequently called upon by the Lord Chancellor to aſſiſt him in his court, in Caſes of difficulty or importance. Sir Eardley's preſence was likewiſe often required at the Privy Council, of which he had been a member ever ſince his appointment to the Common Pleas, either to give his advice in caſes of emergency, or to aſſiſt in hearing Appeals to his Majeſty in Council, which, before the ſeparation of America from Great Britain, were very frequent. Theſe various occupations, ſo entirely engaged his time and his mind at this period, that there was very little leiſure for writing out his Notes, or preparing a correct copy of his Judgments, eſpecially as he never had the leaſt intention of making them public. There are therefore at this time few Judgments under his own hand; which is much to be regretted, as this undoubtedly was the period of his life, in which his abilities were moſt exerted and moſt acknowledged: but though there are comparatively few written out by himſelf, yet there are many publiſhed in the Law Reports of this period, particularly in thoſe of ſir James Burrow and Mr. ſerjeant Wilſon.

In the mean while he never forgot the Profeſſion, which was the firſt object of his choice, and which he might have addreſſed in the language of truth, as well as of poetry:

> Ille meos, primus qui me ſibi junxit, amores
> Abſtulit, ille habeat ſecum, ſervetque ſepulchro.

He was, like his great predeceſſor, ſir Matthew Hale, whom in many parts of his character he much reſembled, a very good Divine, and lived in habits of intimacy with many perſons of high reputation in the church.

He

He was alſo very fond of the Arts, particularly Painting and Muſic; and often talked with rapture of a journey *(l)* into Italy, which he had frequently ſerious thoughts of putting into execution. He made a tour to Paris in the year 1769, and there gratified his taſte for Painting, by viſiting the noble collections in that Metropolis.

On the reſignation of lord Camden, and ſubſequent death of Mr. Yorke, in January 1770, the Great Seal, with other honours, was offered to ſir Eardley by the duke of Grafton.

The day before lord Camden reſigned the Great Seal, he came up to ſir Eardley in the Houſe of Lords, and, pointing to the Seal, ſaid, "there it is, ſir Eardley, you will have it in your poſſeſſion "to-morrow." Sir Eardley ſhook his head, and begged to be excuſed. Lord Camden afterwards told a common friend, that he never was ſo ſurpriſed in his life as when he heard that ſir Eardley had really declined it.

The Great Seal was again preſſed upon ſir Eardley in the courſe of that year by lord North, who, on the reſignation of the duke of Grafton, ſucceeded as firſt lord of the treaſury. But ſir Eardley was at this time too fixed in his reſolution of retiring altogether from public buſineſs; and, having no ſir Joſeph Yates *(m)* near him, it ſeemed to him a good opportunity to urge the ſame reaſon for reſigning the office he held, as for declining the one that was offered him. His ill

(l) He ſays, in a Letter to one of his Sons, 25th November 1769:

"I wiſh much to drag through the next Spring in my preſent harneſs, that we may "raiſe a little larger Bank for our tour through Italy, not deſpairing of a peep at Greece "and Conſtantinople, "ſavente Deo!"

(m) In a letter from ſir Eardley to one of his Sons, 12th June 1770, he ſays, "The "death of Mr. Juſtice Yates has grieved me extremely, and indeed he is a great loſs to "his family; but a much greater to the Public, in a moſt able and upright Magiſtrate."

He

ill health had prevented him occaſionally from attending his court, and he had been under the neceſſity, more than once, (though with much pain to himſelf) of requeſting ſome of his Brethren to attend the Sittings for him, which is not the leaſt important, or leaſt laborious, part of the duty of the Chief Juſtice in each court.

His intention was to have reſigned without receiving any Penſion from the Crown, as is well known in his family; and appears likewiſe in the following Letters which paſſed between the late earl of Hardwicke and ſir Eardley at this period.

" St. James's Square, Dec. 27, 1770.

" My Lord,

" I have for ſome days paſt heard a report of your intention to reſign, and it is now inſerted in the Papers with other Law arrangements,

---

He was buried at Cheam, Surrey, with the following Inſcription on his Monument:

Sacred to the Memory
of the Honourable
Sir JOSEPH YATES, Knight,
of Pul-Hall in Lancaſhire,
ſucceſſively a Judge of the Courts
of King's Bench and Common Pleas;
whoſe Merit alone advanced him to the
Seat of Juſtice, which he filled with the moſt
diſtinguiſhed Abilities and invincible Integrity.
He died the 7th Day of June 1770,
in the 48th Year of his Age,
leaving the world to lament the loſs
of an honeſt Man and able Judge,
firm to aſſert,
and ſtrenuous to ſupport,
the Laws and Conſtitution
of his Country.

ments, about which I am very indifferent; but if what relates to your Lordſhip is true, I am, on account of the public and the profeſſion, moſt heartily concerned for it. If health, as I preſume it is, has principally induced you to take this ſtep, no man has a right to blame, and I moſt ſincerely wiſh you may find relief by quitting buſineſs.

"Allow me to ſay, my Lord, what I do not mean as a compliment, that I have often regretted, that you have not been called forth by all the encouragement the Crown could hold out, to fill a much higher office in the Profeſſion. It would have been a ſatisfaction to me, not only to have ſeen it, but to have given you any little ſupport which had been in my power: but that indeed is an offer not worth thanking me for. It would have made me as happy as any public event can do, after our irreparable loſs, to have wiſhed you joy of a ſituation which you would have filled with credit, ſufficiency, and dignity.

"I may freely ſay this to your Lordſhip in a Letter, though it might have given you pain to have ſaid it in your preſence. If in anſwer to this, you tell me the news about yourſelf is not true, I ſhall ſincerely rejoice on public motives; if you acquaint me that it is, I ſhall attend you with my beſt wiſhes of "otium cum dignitate;" and hope your Lordſhip will continue to honour me with your friendſhip, and ſometimes with your advice and opinion, which in theſe times, I foreſee, I may want.

"I am, &c. &c.

"HARDWICKE."

"My Lord, Ormond Street, 29th December 1770.

"I am honoured with your very obliging letter. The partiality you are pleaſed to expreſs is the more flattering, as I am perſuaded it is the reſult of your friendſhip.

"My

" My health neceſſitates my retreat from public buſineſs, and all that I aſk of his Majeſty is, that he will be graciouſly pleaſed to accept my reſignation, for I have deſired that it may be communicated to the King in the moſt humble manner from me, that I do not wiſh, or mean to be an incumbrance to his Majeſty, by any penſion out of his Civil Liſt *(n)*.

" I cannot omit my moſt ſincere acknowledgments to your Lordſhip, for the ſupport which you ſo kindly intended to have honoured me with, in caſe I had accepted an offer, which, in juſtice to his Majeſty, I muſt, in confidence to your Lordſhip, confeſs, was made me more than once.

" Permit me to aſſure your Lordſhip of a pure and diſintereſted friendſhip on my part; and that whenever you may wiſh to know my ſentiments on any ſubject, you may depend upon having them without the leaſt diſguiſe.

" I have the honour to be, with the greateſt reſpect, &c. &c.

" JOHN EARDLEY WILMOT."

With this view, and to be near the Britiſh Muſeum, which for many years he had much frequented, he took a ſmall houſe in Great Ruſſell Street: indeed, his reſidence in or near town, for the advantage of medical advice, was now become abſolutely neceſſary. But it was with much difficulty he was permitted to decline the Great Seal.—When this was done, and his reſignation of the Chief Juſticeſhip of the Court of Common Pleas was at laſt accepted in January 1771, he was much ſurpriſed and diſconcerted to find, that it was expected he was to receive a Penſion for life. This he withſtood in two ſeveral interviews with the firſt Lord of the Trea-

(n) In a letter to his brother ſir Robert Wilmot, dated the 13th January 1771, he ſays, " I would much rather reſign without any remuneration at all; The " plus" or the " minus" " of ſufficiency lies only in my own breaſt."

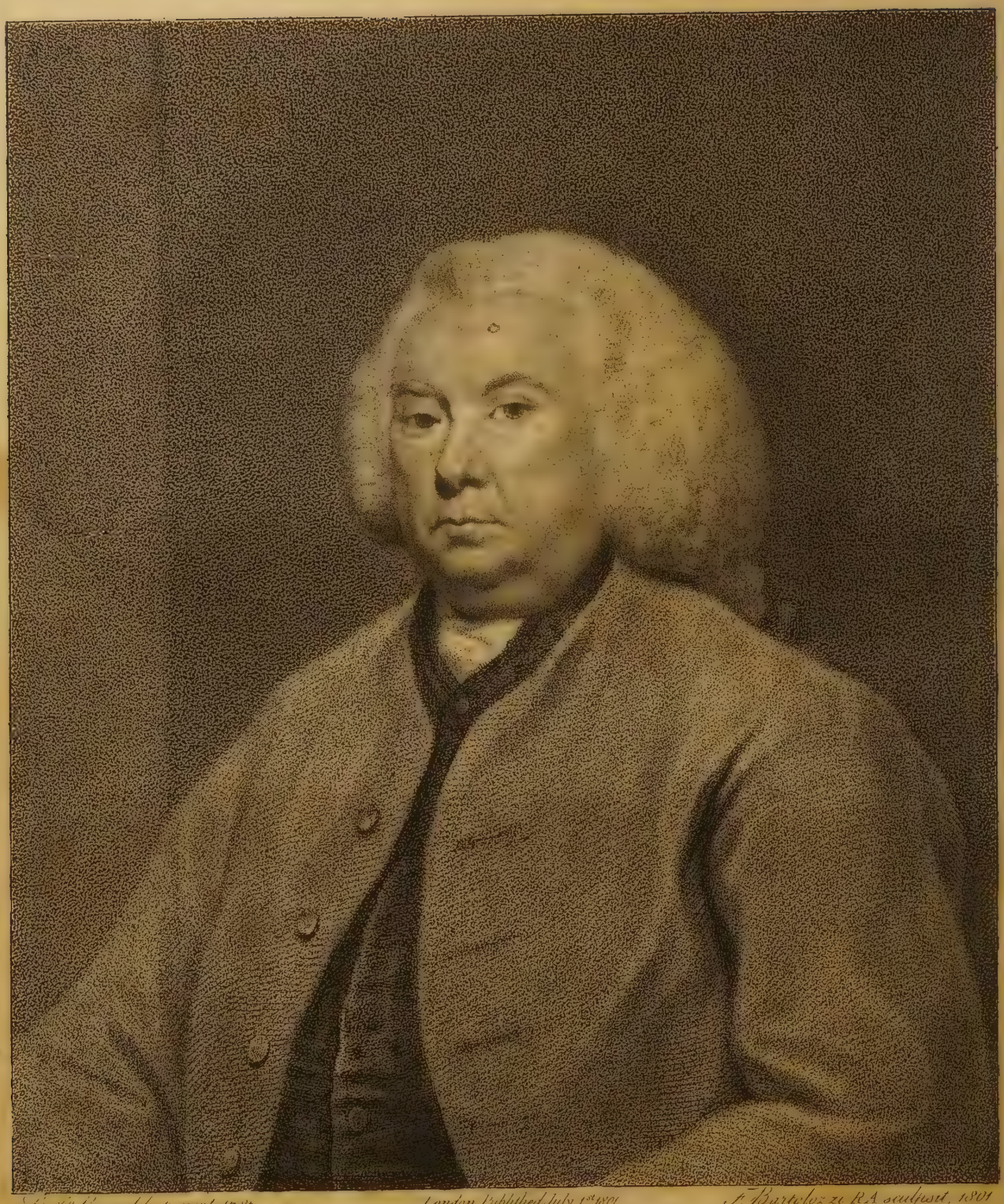
fury: but his Majeſty having deſired to ſee him at Buckingham Houſe, was pleaſed to declare, that he could not ſuffer ſo faithful a ſervant to the Public to retire, without receiving this mark of approbation and reward for his exemplary ſervices. After this, Sir Eardley thought it would be vanity and affectation to contend any longer; and certainly his private fortune would not have enabled him to have lived in the manner to which he had been accuſtomed, and which he thought, while he held his office of Chief Juſtice, the dignity of his ſituation required. However, it would have been no ſacrifice to him to have contracted his ſails, and to have confined himſelf to a narrower channel. It has been ſeen that he was originally a younger brother, had always rather avoided than courted buſineſs, and that he continued only a few years in the court of Common Pleas; he had declined many opportunities of ennobling and enriching himſelf, and yet poſſeſſed ſufficient for his own moderate deſires. He had brought up all his ſons to active buſineſs, and was juſtly ſenſible that this was preferable to any fortune he could give, or leave them. But as he was thus liberally provided for by his Majeſty's bounty, he thought the leaſt he could do was to make every return in his power; and having the honour of being one of his Majeſty's Privy Council, he, in conjunction with the venerable ſir Thomas Parker, who had been Chief Baron of the Exchequer, uniformly attended the Appeals to the King in Council till the year 1782, when his increaſing infirmities obliged him to give up this laſt part of what he thought his public duty *(o)*. His ſervices in this interval

(o) Extract of a letter from ſir Eardley Wilmot to earl Gower, 12th January 1782:

"My Sight and Hearing are extremely impaired; but my Memory is ſo ſhook, that if I could read a Caſe over twenty times, I could neither underſtand nor remember it; and as my attendance at Council would only expoſe my infirmities, without being of any ſervice to the Public, I cannot think of ever putting myſelf into ſuch a diſagreeable ſituation.

"I have the honour to be, &c. &c.

"EARDLEY WILMOT."



Sir J.ª Reynolds pinxit. 1785. London Published July 1st 1801 F. Bartolozzi R.A sculpsit. 1801

THE RIGHT HON. SIR JOHN EARDLEY WILMOT KN.T

Ætat. 75.

interval had been conſtant, and were frequently acknowledged by the Lord Preſident of the Council, and by the Miniſter in Parliament.

About this time, the reverſion of an eſtate in Derbyſhire, of about £. 400 per annum, fell in to him by the death of a gentleman, to whoſe family he was allied, and with which in the early part of his life he had lived in great intimacy: but there being an illegitimate ſon of one branch of the family alive, whom ſir Eardley had patronized from his birth, he immediately made a conveyance of the eſtate to him for his life, and intended, if he had had children, to have given him the whole intereſt in it. This gentleman enjoyed the eſtate twenty-ſix years, and died in 1797, without children, leaving a ſmall Eſtate which he had purchaſed, and which joined to the former, to ſir Eardley's eldeſt ſon, and his heirs for ever.

He now retired totally from public buſineſs, and ſaw very little company during the remainder of his life, except a few friends, whom time had hitherto ſpared. The principal of theſe were, lord Shelburne, ſince created marquis of Lanſdown, ſir Thomas Parker, lord Huntingdon, lord Hardwicke, and lord Bathurſt, by whom he was frequently conſulted, while he held the Great Seal, both on political and legal ſubjects. He was reſorted to by theſe and a few others for advice and for entertainment, his converſation being equally chearful and inſtructive. A perſon who with the greateſt honour to himſelf and advantage to the nation, has filled many high ſtations in public life, told the writer of theſe ſheets, that he was never in his company without feeling himſelf the happier and the better for it. He mentioned, among other anecdotes, that he once went to ſir Eardley, under the impreſſion of great wrath and indignation, at a real injury which he had received from a perſon high in the political world, and which he was meditating how to reſent in the moſt effectual manner. After relating the particulars to ſir Eardley, he aſked, if he did not think it would be "manly" to reſent it? Yes,

ſaid ſir Eardley, certainly, it will be "manly" to reſent it: but, added he, it would be "God-like" to forgive it. This the gentleman declared had ſuch an inſtantaneous effect upon him, that he came away quite a different man, and in a totally different temper from that in which he went.

His principal ſociety was in the boſom of his own family, as three of his children were married, and had preſented him with twelve grandchildren. His wife, indeed, a moſt faithful and exemplary one! and his eldeſt ſon, who, to ſay all, was worthy of ſuch a father! he was ſo unfortunate as to loſe, in the two ſucceſſive years after his retreat from public buſineſs. Theſe loſſes, though he felt like a Man, he bore like a Chriſtian. But inſtead of attempting to deſcribe his virtues in private life, and the infinite pains he took to inſtil into the minds of his children the principles of religion and virtue, it may not be unacceptable to the Reader to ſelect a few of his letters to them in the different periods of their youth.

Extracts of Letters from ſir JOHN EARDLEY WILMOT to his Sons.

To one of his ſons, aged thirteen, at ſchool.

"London, 17th November 1762.

"If any thing could add to the love and affection I have always had for you, it is the manner in which I find by your letter to your brother, that you have treated the obſervations made upon your wearing your brother's coat; and I rejoice in it as an earneſt of a ſound underſtanding, as well as of its being a preſage of your advancement in life; for "whoſoever humbleth himſelf ſhall be exalted:" and to give you ſome ſmall teſtimony of my approbation of your conduct, I have ſent you a watch, which I deſire your acceptance of, to encourage you to walk humbly before God and man. Be aſſured that humility is the ſweeteſt and faireſt flower that groweth

groweth in the mind; that it perfumes the owner with the moſt attractive ſweets; that it ſhews in the faireſt point of view every virtue which adorns and dignifies human nature, and ſhades every imperfection, which tarniſhes and diſgraces it. Be proud of nothing, but of acting firmly and ſteadily upon the principles of religion and virtue, and then I am ſure, if I am proud of any thing, it will be of having ſuch a ſon."

To the ſame.

" 1ſt Auguſt 1763.

" The only object I have in life is to make you all happy; and I would wiſh to give you in perfection every accompliſhment, which may make you honoured and eſteemed in thoſe courſes of life which you muſt reſpectively purſue, for getting your own livelihoods. Your eldeſt brother has choſen to go to the Eaſt Indies, and is now learning french, writing, and merchants' accounts, in order to qualify himſelf for the Eaſt India Company's ſervice; and as you ſeem to give the Law a preference, an intimacy with all claſſical knowledge, and more particularly with the Greek and Roman Orators, is an eſſential capital point, and to be cultivated with the greateſt induſtry and application. Above all things, attend to the ſubject-matter of their orations, and to their modes of thinking upon and treating their ſubjects; and beſide the choice and elegance of their diction, you will find every thing which can be ſaid or thought of upon the ſubject, gathered together and urged with ſuch reſiſtleſs force, as muſt have amazed and tranſported their audience—but remember, you are to ſpeak neither in Latin nor Greek, and that language is the vehicle of ſenſe; and therefore, uſe yourſelf to write and ſpeak your own language correctly; and I can adviſe you to nothing ſo likely to improve you in that moſt material qualification for a lawyer, as tranſlating Greek and Latin orations into Engliſh. Your mind will be thus

thus impregnated with their thoughts, ſpirit, and fire, and you will find yourſelf ſurpriſingly improved every day in ſpeaking and writing your own language.

" The noble lord *(p)* who was ſo kind as to take notice of you, is a moſt eminent example of the utility of a claſſical education: he laid all his foundations in Greek and Roman oratory and poetry, and by an unintermitting cultivation of the prodigious natural powers of his mind, has beaten all his maſters.

" My bleſſing and kindeſt love to your brother; and be aſſured, that the pleaſure you ſeem to take in conforming to my wiſhes, endears you to me extremely; and that your duty ſhall always meet with an equal return of affection from your fond and indulgent father."

To the ſame.

" 27th Auguſt 1764.

" I take the firſt vacant hour I have had this month, to acknowledge the receipt of your Letter, and to aſſure you of my love and affection. I do not in the leaſt doubt but you will merit every paſt and future inſtance of them, by ſeconding my endeavours to cultivate your mind, and principally to impregnate it with thoſe principles of honour and truth, which conſtitute a Gentleman, and which I received in the utmoſt purity from my own father, and will tranſmit to you, and to your brothers and ſiſters, as unſullied as I received them; and however fortune may exalt or depreſs you in the world, the conſciouſneſs of having always acted upon thoſe principles, will give you the only perfect happineſs that is to be found in this world. But above all things, remember your duty to God, for without his bleſſing, my love and affection for you will be as ineffec-

(p) Lord Mansfield.

tual

tual to promote your happineſs here, as hereafter; and whether my heart be full of joy or of grief, it will always beat uniformly with unintermitting wiſhes, that all my children may be more diſtinguiſhed for their goodneſs than their greatneſs."

To the ſame.

" 22d Auguſt, 1765.

" I am by no means anxious for your taking the track of the law, and therefore, if any other turn of life is more agreeable to you, I could wiſh you to take it, as my ſole point with you is to put you into the road which is moſt agreeable to you, and then you will be moſt likely to ſucceed in it; for if any accident ſhould happen to your Brother, it will not make the leaſt variation in your fortune, and you muſt entirely rely upon your own induſtry and abilities for the fabricating of it; and as the gain or loſs will be your own, I am willing, and indeed deſirous, to take your own choice in the deſtination, whether it be to the Law, or to the Church, or the Army, to Phyſic, or any other civil employment. Be confident that the pains which are neceſſary to make your own fortune, will be moſt amply compenſated to you, by the ſatisfaction which ariſes from independency, and in that reſpect the Law has charms ſuperior to any other. As you are now between ſixteen and ſeventeen, you muſt ſeriouſly conſider and examine the feelings of your own mind; and to whatever figure in the dial of buſineſs the finger points, you muſt invariably keep your eyes fixed upon it; all your ſtudies, and applications, and habits, muſt lead towards it; and if you ſhould diſcover in yourſelf any ſentiment in favour of a military life, the courſe of your ſtudies for that profeſſion can be no where more ſucceſsfully carried on than where you are *(q)*: but in the " legal" path, it may

(q) Then at a foreign Academy.

admit

admit of doubt, whether too much foreign language may not prevent that fluency in your own, which contributes very materially to the formation of the forenſic ſpeaker here; for though ſenſe, ſtudy and application may make you a very good Lawyer and give you knowledge, yet it never ſhines at the Bar, but through the medium and vehicle of a great command and choice of words to adorn and embroider it."

To the ſame.

" 21ſt April 1766.

" I have received yours, and the Term being begun, I have not had time to compare the oration *(r)* with the original, but ſtole an hour yeſterday for the firſt ſheet, which I return herewith. I aſſure you, I found it much better than I expected, and you cannot purſue an exerciſe which will be of greater ſervice to you; for beſide improving yourſelf in the knowledge of Latin, it will facilitate the great and arduous work you have undertaken, the ſpeaking " apte, ornate, et diſpoſite," in your own language—it will give you a great ſtock of words, and inſenſibly impregnate your mind with very beautiful ideas, and a happy manner of expreſſing them: and I wiſh you to attain ſuch a knowledge of the Greek, as may enable you to read Demoſthenes, becauſe his conciſe and nervous manner of ſpeaking ſtrikes an audience more forcibly than Tully's, and is more adapted to the taſte of the preſent age. They are both excellent in their ſeveral ways: I forget who, but I think it is Longinus, who ſays, " Tully ſtrikes with his hand open, and Demoſthenes

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(r) Pro Archia Poeta.—In another letter about this time, he ſays, " you could not have choſen an oration more emphatically deſcriptive of my ſentiments upon the advantage as well as ornament, which every ſpecies of literature imparts to a Lawyer: but even independently of all profit and praiſe (which was the immortality of the heathens) it was, in Plato's opinion, the only phyſic for the ſoul; and Pliny calls it, " unicum doloris levamentum."

with

with his hand cloſed;" and that the one "blazes like a fire, but the other throws thunder-bolts;" and till you have advanced a little further in Greek, you cannot do better than take another of Tully's orations, and amuſe yourſelf now and then with a play of Terence, where you will find more good ſenſe than in all the plays that have been written in this country. I have a great inclination to read Livy over again myſelf, and therefore reſerve that book for the vacation, and we will take an hour every day together, in walking over that fine embroidered carpet of Roman hiſtory. There is a ſtrain of honour and greatneſs in the Greek and Roman writers, which, like muſic, ſpeaks to every ſublime and virtuous principle of the mind.

"Logic is certainly dry and unentertaining, but ſtretch all the nerves and ſinews of your mind to attain it; for it is of infinite uſe in ſetting a keen edge upon the underſtanding; and beſides, it gives an eagle eye in detecting falſe reaſoning and ſophiſtry. I never knew an able Logician, who did not acknowledge and feel the utility of it in forenſic practice: and if you wiſh to figure in a legal profeſſion, you muſt travel through many dry, unpleaſing countries, where nothing can ſupport you in the journey but catching a glimpſe, now and then, of the terreſtrial paradiſe which is at the end of it; by which terreſtrial paradiſe, I mean a ſtate of independence, and a capacity of living as you like to do, without deviating from the paths of honour and virtue, or courting either fools or knaves for a livelihood: and I hope it will be written upon the tablets of your heart, in characters not to be effaced by ambition, avarice, or pleaſure, that the only ſure and certain happineſs to be found on this ſide of the grave, is a conſciouſneſs of your own rectitude. All peace and homefelt joy is the gift of virtue, and there is no applauſe in this world worth having, unleſs it is crowned with your own.—A ſhip is juſt come from the Eaſt Indies, and we expect every hour to hear of your brother; for whoſe health and proſperity unite your prayers with thoſe of your moſt affectionate father."

To the ſame.

" 21ſt October 1766.

" I ſhould think myſelf very defective in my duty to you, if I did not moſt warmly exhort you to take more care of your health than you have done; for if the foundations are weakened at your years, debility of body will moſt infallibly draw on debility of mind, and extinguiſh that " vivida vis animi," which ſets one part of the human creation at as great a diſtance from the other, as there is between a bird and an oyſter. I am glad to hear you are fallen at once into an academical life. Let me recommend a conſtant attendance on prayers; for religious habits give religious practices; and whatever reſolutions you may deliberately make, if Religion does not bind the obſervance of them upon your mind, human reaſon will be too weak for the impulſe of human paſſions, and you will find the ſteerage of yourſelf through thoſe rocks moſt dangerous, and frequent ſhipwrecks unavoidable. It has been my wiſh to pilot you through youth with ſafety. It is a very difficult paſſage, and I ſhall keep my hand at the helm while I am able. I have always recommended œconomy, not from any avaricious motive, but becauſe I know that expence and ſtudy will not mix together in any mind that does not burn with ambition—and of all the evils, or rather devils, which laſh mankind, I would wiſh to keep you out of that domination; for when it ſteps beyond that ſwell, which the conſciouſneſs of virtue and moral rectitude infuſes, it is the ſource of unhappineſs and all iniquity, and every homefelt joy departs before that tyrant. Be aſſured, that all the parts which nature ever gave, with all the knowledge of Greece and Rome, embelliſhed with all the ſcience which philoſophy can impart, are not worth one ſingle wiſh, if they do not lead their owner to think humbly of himſelf, and at the ſame time to feel that inward greatneſs of ſoul, which looks only at the rectitude of meaſures, and is uninfluenced by any motive that is not bottomed

upon religion and virtue. Above all things, keep your eye ſteadily upon the fabricating of your own fortune, and ſtanding upon the ground you make yourſelf, without expecting aſſiſtance from either friends or relations; and it is an infallible receipt for procuring aſſiſtance, to ſhew you do not want it. I am ſo ſincere a friend to the Univerſities, that I hope the reform *(s)* will be carried with ſuch "comitas," temper, and moderation, as may procure a ſubmiſſion to it from a conviction of its propriety and rectitude. Indeed, I am ſuch an enthuſiaſt in the cauſe of literature, and am ſo ſatisfied of the neceſſity of reforming the expence of the Univerſity, to ſerve that cauſe effectually, that I moſt cordially wiſh ſucceſs to the regulations, and think the Chancellor deſerves the thanks of the nation for attempting it *(t)*.

"Mr. Jones *(u)* has been with me this morning—he ſeems a genius—and you may rely on my ſhewing him all the civility in my power."

To

(s) Then about to take place in the Univerſity.

(t) In another letter he ſays, "I have long been a warm advocate for our Univerſities, and for that reaſon have been perhaps too rigid and ſevere a diſciplinarian; for their exiſtence depends upon the activity and honour of the tutors and heads of houſes; and whenever there is a total relaxation of diſcipline, and they either do not take care to know, or whenever they connive at idleneſs and diſſoluteneſs, the Parliament muſt and ought to take the reformation of them into their own hands, and attempt to reſcue the riſing generation from vice and ignorance, by ſome new ſyſtem of academical government."

(u) Afterwards ſir William Jones, at that time a ſtudent of Univerſity College, Oxford, with whom the Editor was intimate, and kept up a conſtant intercourſe of friendſhip and correſpondence, both before and after they quitted that learned ſeminary.

As the following letter from this eminent perſon relates to ſir Eardley's reſignation in 1771, and likewiſe contains ſir William Jones's ſentiments on the ſtudy of the law, it may not be improper to inſert it here.

"Univerſity College, Oxford, 3d January 1771.

"* * * * *,

"It makes me very happy to hear, that my Lord Chief Juſtice retires from a motive that does him the higheſt honour. He will now enjoy the greateſt happineſs of human

To the ſame.

" 3d March 1768.

" * * * I have not the leaſt predilection for Divinity, as a Profeſſion.—I ſaw very early the inanity and futility of ambition and avarice; but it threw me into another extreme—of wiſhing to do nothing

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life, eaſe with dignity, after having paſſed through the moſt honourable labours without danger. I ſhould think myſelf highly bleſſed, if I could purſue a ſimilar courſe in my ſmall ſphere, and after having raiſed a competency at the Bar, could retire to the bowers of learning and the arts.

"I have juſt begun to contemplate the ſtately edifice of the Laws of England,

" The gathered wiſdom of a thouſand years,"

If you will allow me to parody a line of Pope. I do not ſee why the ſtudy of the Law is called dry and unpleaſant, and I very much ſuſpect that it ſeems ſo to thoſe only who would think any ſtudy unpleaſant, which required a great application of the mind and exertion of the memory. I have read moſt attentively the two firſt volumes of Blackſtone's Commentaries, and the two others will require much leſs attention. I am much pleaſed with the care he takes to quote his authorities in the margin, which not only give a ſanction to what he aſſerts, but point out the ſources to which the ſtudent may apply for more diffuſive knowledge. I have opened two common-place books, one of law, and the other of oratory; which is ſurely too much neglected by our modern ſpeakers. I do not mean the popular eloquence which cannot be tolerated at the bar, but that correctneſs of ſtyle and elegance of method, which at once pleaſes and perſuades the hearer. But I muſt lay aſide my ſtudies for about ſix weeks, while I am printing my grammar, from which a great deal is expected, and which I muſt endeavonr to make as perfect as a human work can be. When that is finiſhed, I ſhall attend the court of King's Bench very conſtantly, and ſhall either take a lodging in Weſtminſter, or accept the invitation of a friend in Duke-ſtreet, who has made me an obliging offer of apartments. He has two nephews at Weſtminſter-ſchool, and by helping them now and then in their exerciſes, I ſhall find an agreeable relaxation from ſevere ſtudies.

" On one of the Indian pictures that I ſaw at your houſe, there was a beautiful copy of Perſian verſes, which I will beg leave to tranſcribe, and ſhould be glad to print it with a tranſlation in the appendix of my grammar. I have not yet had my Perſian propoſals engraved, but when you write to your brother, you would much oblige me, if you would deſire him to ſend me a little Perſian manuſcript, if he can procure it without much trouble. It is a ſmall poem which I wiſh to print. I have incloſed its full title in Perſian and Engliſh.

* * * * " W. Jones."

nothing beyond the bounds of a Pariſh: whereas we were certainly intended to exert our powers in thoſe ſtations of life, for which Providence has ſhaped and fitted us. I do not mean to inſinuate that the life of a country Parſon is not one of thoſe ſtations; for it certainly is, and demands both abilities and entire dominion over paſſions, to execute it properly; but I mean to acknowledge, that a falſe motive at that time led me to the choice of it, and therefore neither let the cauſe, nor my example in that wiſh, influence your conduct in the remoteſt degree.

" It is always right, that a man's wiſhes ſhould go along with the profeſſion he is to follow; but his wiſhes ſhould not be actuated by a baſhful, timid, and indolent principle.

" Divinity is certainly a very noble ſtudy, and, conſidered as a profeſſion, is highly honourable.

" Phyſic is likewiſe ſo; apprenticeſhips to both are ſerved in the Univerſities, and the latter is finiſhed by foreign travel.

" The true apprenticeſhip for a Conveyancer, is the ſame mode of ſtudy and attendance upon courts, that the Bar requires; and the hand of ſome eminent conveyancer will mature him greatly, and warm him into an effective exiſtence much earlier than can otherwiſe be expected.

" If money be the principal object, Agencies for Plantations, and the channel in which Mr. * * * * runs, is ſuperior to any.

" Going abroad with Ambaſſadors, and qualifying for that moſt uſeful employ, is a primroſe path of pleaſure; but I am afraid there is no ſolid gold under it.

" I do not mention the Army, Navy, and Trade, becauſe your antecedent ſtudies and courſe of life have not pointed that way: but to the other profeſſions, you have not been an inch out of your way yet. Do not diſquiet your mind about the choice; leave it to time and to me to determine for you; but reſt aſſured, that I will take

take your wiſhes along with me, and that I will direct and guide, not controul or force them from their natural bias. Your ſtudies have been hitherto well directed; and be aſſured you will find your taſte refined, your mind ſublimed, and a noble dignity of ſentiment infuſed into you, from mixing Longinus into your blood, and purifying it with his virtues.

" I rejoice to find you take ſo kindly to Tacitus: it has always been a favourite book with me, and is an inexhauſtible reſervoir of political wiſdom. You enter ſo fully into the ſpirit both of the hero and the hiſtorian, that I defy you to diſcontinue it; and if you could manage ſo as to let me lie in your room, I think I ſhould make you a viſit for three or four days at Whitſuntide, and treat myſelf with ſome of the celeſtial manna of claſſical learning.—See my plan —riſe at ſix—chapel—five hours ſtudy, and a walk before dinner—ride in the afternoon—" atticæ noctes," and to bed at ten—and next to the pleaſure of ſeeing you, the being ſequeſtered from the ſtrepitus of this town, will be no ſmall part of the pleaſure of ſuch a retreat. I wiſh I could put you into the office I have, and take the pleaſing, ſequeſtered, delicious, undiſturbed hours of ſtudy which you enjoy, without a ſingle thought of worldly affairs, or caring what becomes of the Great Mogul or Benjamin! *(x)*

To another of his Sons, at that time intended for Commerce.

" 10th October 1768.

" I am happy to find you have taken ſuch a wiſe and ſpirited reſolution, and am fully perſuaded you will tread in my ſteps, and be the architect of your own fortune, with " a conſcience void of offence towards God and towards man." In a commercial country, as ours is, depending upon trade entirely for its luſtre and greatneſs, a merchant always has been, and is at this time, one of the moſt valuable

(x) His agent in the country.

valuable as well as the moſt dignified characters in the whole community; but the foundations of ſucceſs in it, muſt be laid at firſt in frugality, and an eſtabliſhed character for honour and probity. It is in your power to practiſe the one, and by an honourable and courteous deportment to acquire the other. Beſides the homeſelt joy which virtue always bleſſes her votaries with in this world, it inſures affluence and pleaſures, and gives a well-grounded hope of beatitude in the next.

" You always have had, and ſhall have, all the encouragement I can give you; and when I grow old, you and your brothers muſt return my attention to you, by ſhewing you have profited by my inſtructions, and have not ſuffered either the vicious, or the vain and fooliſh, paſſions of this age to pollute your minds, and turn you out of the " ways of pleaſantneſs and the paths of peace." I have ſeen your letter to your brother, and am very happy to find ſuch an honourable turn in your mind; it falls in with the favourite paſſion and wiſh of my ſoul, that all my children ſhould look off themſelves and their own ſelfiſh gratifications; and from your grateful and ſpirited conduct, I have the ſtrongeſt aſſurance that you will inherit all the virtues of my father, without any intermixture of the infirmities of your own."

To one of his Sons.

* * * " London, 1768.

" I am ſorry for your own ſake to hear you find a want of that moderation and conſtancy of mind, which alone enable a man to go through life with credit and comfort.

" I am very ſenſible that parts and ſpirits and natural abilities, and that elevation of ſoul, which unites humility and ſupereminent greatneſs together, are in the power of no man. They are " particula divinæ auræ," perhaps infuſed by God, when he firſt animates the clay;

clay; and their effulgent brightneſs is viſible to every diſcerning eye, whether it irradiate a prince or a beggar: but moderation is a virtue in every body's reach, and a very looſe philoſophical regimen is ſure of bringing a cure along with it. I wiſh you would more particularly diſcloſe in what inſtance you feel the want of it, and I will aſſume the office of a phyſician for the ſoul, and preſcribe ſome of that medicine which I took from Plato when I was at the Univerſity.

"Conſtancy, in my dictionary, is ſteadineſs and perſeverance in a reſolution once rightly taken. What can be the difficulty of whipping all ſeducing, ſtraggling thoughts out of the mind, intruding upon a man's own happineſs? For if the reſolution be rightly taken your own felicity is the object of it; if it be not rightly taken, the ſooner it is broken, the better. But remember, that to be humble is to be great, to be contented is to be wiſe, and to ſubdue the paſſions is to be good; and that habit is the beſt and ſureſt friend to forward you towards the attainment of thoſe great bleſſings. Read Longinus again in Greek, in Latin, French, and Engliſh: Rouſe up all your faculties, and let your ſoul out to ſtrive for the prize in the tilts and tournaments of literate glory: throw off all your chains, and ſtruggle, without intermiſſion, for that dominion over yourſelf, which will do honour to my memory when I ceaſe to be

"Your affectionate father."

In another Letter he ſays:

"You ſay you are now without ambition; if you mean the ambition of being learned, and attaining that greatneſs and haughtineſs of ſoul, which inſpires a contempt of riches and of death, I am very ſorry for it, becauſe it is that ſublime exaltation of human nature

which

which fixes the attention of gods and men to its contemplation, and conſtitutes the only certain beatitude upon earth. It is a perpetual ſpring of joy, and the only ſource of free agency in life.

" If you mean by ambition, a deſire of getting money for the gratification of pride and vanity, I moſt heartily rejoice that you are delivered from the very worſt tyrant that torments human nature. Every man, who has not a fortune from his anceſtors, muſt acquire a maintenance for himſelf (and his family if he has one) by his own labour and induſtry. He may very laudably propoſe, both to advance himſelf and his fortune in the occupation he chuſes; but he muſt tread on the ſtars in his own mind, and not reſt his glory upon the pageantry of honours and riches. His felicity can and muſt ariſe only with certainty out of the conſcioufneſs of his own unſpotted conduct, and his greatneſs out of the ſovereign contempt he entertains of what the world calls grandeur, finery, and the painted embroidery of vanity miſdirected."

To his Son at Oxford.

" February 1769.

" You ſeem to be in a very improving ſociety, and you expreſs my own ſentiments very diſtinctly, in giving ſo juſt an eulogium to the moral and virtuous part of Mr. Wren's *(y)* character; and indeed all natural parts and acquired knowledge, without honour and virtue, only ſerve to ſhew the deformity of human nature, inſtead of gilding and irradiating it. I ſay nothing of Mr. Wilkes, becauſe academics

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(y) Matthew Wren, third ſon of Chriſtopher Wren, of Wroxall, in the county of Warwick, eſquire, a lineal deſcendant of that eminent architect and excellent man, ſir Chriſtopher Wren.

On the death of this amiable and virtuous young man, ſome time after, he ſays, " a mind impregnated with ſuch eminent virtues as you mention, is ſo rarely to be found in this profligate and licentious age, that the extinction of ſuch a character is a public misfortune."

ſhould never be diſquieted with any political convulſions that did not happen amongſt the Greeks and Romans; and I am ſure I do not ſtarve them in quantity or quality, by confining their ſpeculations to a tract of two thouſand years, dignified with ſuch a variety of events, that when they themſelves come to figure upon the ſtage, they will ſay with Solomon, "There is nothing new upon the face of the earth." I know nothing but what I ſee in the news-papers, and wiſh I was deprived of the ſenſe of hearing another word of politics whilſt I live. I believe I forgot to tell you that your brother, in the Eaſt-Indies, had ſent his brother Eardley a bill for £. 100. which I have ſent him. I received a letter from him, which is ſo honourably animated, that I entertain the higheſt opinion of him. He deſires me to retain the extraordinary expences of his illneſs; and will give you one half of the remainder. His offer inſures my refuſal; but, as a picture of his mind, I value it at the rate of the moſt brilliant jewel in the Mogul's crown. I have been at the Royal Exhibition, and with joy contemplate the riſing ſtate of one of the fine arts. We want nothing but the exemplars which Italy furniſhes, to rival them in the laſt century, and quite to beat them in the preſent.

"The Ruſſians have taken Azoph, which you will find at the embouchure of the Don (or Tanais, as it was antiently called) into the Palus Mæotis. If they had ten of our men of war there, the creſcents that irradiate Conſtantinople, might very ſoon be at the bottom of the Helleſpont."

To the Same.

"6th November 1769.

"On my return home to-night I found your letter, which ſurpriſed me extremely, as I had quite laid the fellowſhip *(a)* out of my contemplation, and did not ſo much as know you were even a can-

(a) A fellowſhip of All-Souls College, to which his ſon was juſt elected.

didate

didate for it: I do moſt extremely rejoice at the event, and congratulate you upon it; and it is a moſt ſingular ſatisfaction to me, that you owe your advancement to your own character, and to no intereſt derived through me. You have a home for ever ſecured to you, till you inflict a wife upon yourſelf, or exchange one emolument for a better.—I hear the duc de Choiſeul totters on his miniſterial throne, and that he is likely to find very ſoon, that there is more danger in the eyes of a baſiliſk, than in all the ill-will of the princes of the blood, or the noble reſiſtance of a hero *(b)*, fighting for the liberties of his country!"

To his youngeſt Son.

" 30th March 1770.

" I feel myſelf in a gradual ſtate of decay, and have thoughts of devoting the remainder of my life to that peace and quiet, which are ſuitable to threeſcore, " the world forgetting, by the world forgot;" and when I am forced to walk on foot, perhaps my legs may not be ſo torpid and inactive as they are at preſent. Your brother is at All-Souls, leading the life which of all others my ſoul pants for—ſequeſtration from the cares and vanities of life, and a cultivation of the human underſtanding. May God grant you ſucceſs in the ſeveral roads you have taken, both equally honourable and uſeful to the community; and which, by ſobriety, diligence, and a conſcientious diſcharge of your duty, equally lead to the attaining of the end to be kept for ever in your eye—a comfortable ſubſiſtence in this life, and the ſalvation of your ſouls in the life to come!—I am much obliged to you for what you ſay of ſuffering for me; but I moſt anxiouſly hope that your animal and mental powers may increaſe, in proportion as they decay in

" Your moſt affectionate Father."

(a) General Paoli.

To his eldeſt Son in the Eaſt Indies.

" 28th December 1770.

* * * " You refer to another letter for an account of your new appointment *(c)*, but no ſuch letter has been yet received. I ſhall rejoice to hear that you find the ſtrength both of your body and mind equal to it; and remember, that the more you are exalted, the more circumſpect and cautious you muſt be; for envy empties all her quiver upon aſcending merit; and nothing turns the arrows off ſo ſurely, as an humble and affable deportment. I have in my own caſe experienced the utility of it, and that it carries very moderate natural and acquired abilities, far beyond their common and ordinary flight. I grow an old man, and therefore I cannot help adviſing, which is one of the ſymptoms of old age; but you muſt impute it to its true ſource and motive, an anxiety for your good. I hold up pretty well, but my ſight, hearing, and apprehenſion gradually decreaſe, and I ſhall leave my office very ſoon, and lead a retired life, which has been my wiſh ever ſince the firſt dawn of my reaſon; and I think forty years profeſſional pains and labour will well entitle me to a few years receſs, and that no part of my family will repine at it.

" I am very ſorry to tell you, that this nation is of late grown ſo licentious, and deals abuſe out ſo liberally upon the characters of all ranks and degrees of men; and there is ſuch a malignity of temper, and avidity for detraction and obloquy, as I am afraid will end in deſtroying that ſubordination to law and government, which is the true and only ſource of the happineſs of a people. The ſcenes of anarchy and confuſion exhibited on the Aſiatic ſtages, particularly in Perſia

(c) In the Eaſt India Company's ſervice.

and

and Indoſtan, are ſo frightful, that I dread all meaſures which have a tendency to introduce them here; and nothing ſeems to move ſo powerfully towards that end, as indiſpoſing the minds of men to the laws and government under which they live *(d)*. Irreligion, prophaneneſs, and ſenſuality of every kind, have tainted the maſs of the people in and about this metropolis; but I truſt and believe, that the people of England in general are too ſenſible of the bleſſings they enjoy, under this well-poiſed conſtitution, to ſwallow the poiſon which pamphlets and news-papers adminiſter every day to the diſſolute and profligate part of the community. I am perſuaded the principles of religion, loyalty, and patriotiſm (by which I mean ſupporting the laws and conſtitution) are too deeply engraved upon your heart, ever to be erazed by any motive or conſideration whatſoever; and therefore have not written upon this ſubject to you from the leaſt diffidence of your ſentiments or conduct, but really to inform you of the very diſagreeable ſtate of things, from the turbulent humour of the people in this town.

" Your brother is ſtudying Divinity at Oxford, and your uncle has been ſo good as to promiſe him the living of Weſton: if he can be contented with it, he will be happy; and if he cannot, millions of worlds will not fill that bottomleſs pit, in which ambition and avarice bury their votaries!

" May you ever enjoy a ſerene, undiſturbed mind, and may the conſciouſneſs of your own rectitude give you the beatitude which it has always given to your

" Moſt affectionate Father."

(d) The ſentiments contained in this and the following letter on the ſubject of law and civil government, are almoſt prophetic of the dangers to which not only this country, but all civil ſociety, have of late years been expoſed. But there is " an elaſtic ſpirit in this Conſtitution," which, with the bleſſing of God, has preſerved it!

To

To the Same.

" 28th February 1771.

* * * * " I found the faculties of my mind, as well as my ſight and hearing, ſo much impaired, and the general ſtate of my health ſo unequal to fatigue, that, upon the 24th of laſt month, the King was moſt graciouſly pleaſed to accept the reſignation of my office of Chief Juſtice of the court of Common Pleas; but being to continue a Privy-counſellor, I ſhall attend there occaſionally, when my health will permit it; and I already find that the reſt and quiet I have had for the month laſt paſt, and the regimen I am now in (which I could not before attend to) have a great effect, and will moſt probably, with the bleſſing of God, enable me to live many years in an eaſy tranquil ſtate, free from much pain; and as I am now in my ſixty-ſecond year, and have been in buſineſs all my life, I have executed, what I always meditated—a timely retreat. The King, as a mark of his approbation of my conduct in his and his grandfather's ſervice, did, of his own accord, and without the leaſt application from me, or moſt remote intimation of a wiſh or expectation of any remuneration, order a Grant of a Penſion to be made out to me, of £. 2,400 per annum, which being ſubject to many taxes and other drawbacks, will produce net about £. 1,800 per annum.

" You know my averſion to politics ſo well, as to believe me when I ſay, that I have nothing to do with party conteſts of any kind whatſoever; but I cannot help expreſſing my joy upon your account, as well as that of the nation, that our apprehenſions of a war with Spain are now over, an accommodation having been made this month. A war with France muſt inevitably have followed a war with Spain; and I am perſuaded, that an attack upon our Eaſt India ſettlements would have been the firſt object in the direction of French hoſtilities.

" The

" The greateſt joy of my life is to hear from you, and therefore pray do not omit it when you have an opportunity. May the Great Being, who preſides over all, take and keep you ever under his immediate protection, and return you ſafe, at his appointed time, to your

" Moſt affectionate Father."

To the Same.

" 5th April 1771.

* * * * " Your new office *(e)* muſt, at firſt, have been diſagreeable to you, and the miſerable objects, which famine and diſtemper preſent to your view, muſt have greatly added to that uneaſineſs; and, according to the account you give of it, it calls for the exertion of every movement of the human underſtanding, and every benevolent quality that warms a human heart. I have a confident faith, from the ſpirit of all your letters, that the Company will find an able and an honourable ſervant in you; that your acquiſitions will be the fruit and reward of your virtues; and that, " before I depart hence, my eyes will ſee your ſalvation " in your native country!—I have already informed you, by the ſhips of this ſeaſon, of my retreat from all buſineſs, and of the King's goodneſs to me; and from the ten weeks experience I have this day had of retirement, it is the ſtate of all others which beſt ſuits the colour of my mind, and my heart is eaſed of much " perilous ſtuff," which always lay upon it: it gives me time to look into my account with Heaven, and to prepare for that great Audit-Day, when we muſt all give an account of " the works done in the fleſh;" when meekneſs and humility will be exalted, and all the pomp, place, parade, precedence, and pride of this vain world, will be conſidered according to their intrinſic worth. As I am upon

(e) In the Eaſt India Company's ſervice.

ſo

ſo intereſting a ſubject, let me exhort you to read with the greateſt attention both the Old and New Teſtament, and to receive the Sacrament whenever you have an opportunity. You will find your mind extremely becalmed by it, and every tumultuous paſſion bridled by that firm belief of a Reſurrection, which is ſo evidently marked out and impreſſed upon mankind by Chriſtianity.

" It will entertain me extremely to read ſome of your tranſlations out of Perſic: I know there is a great fund of ſound morality and policy in the Aſiatic philoſophical and political books; and their poetry is ſung by nightingales, in " buſhes of roſes;" but to " ſpeak " a language, I have obſerved double Tranſlation is the moſt uſeful exerciſe, and I have erred extremely myſelf in neglecting it; for though I underſtand two ancient and two modern languages, I can ſpeak none of them.

" I find you are apprehenſive of the cataſtrophe of Engliſh ſecurity; and if an opinion was to be taken from pamphlets and newspapers, your apprehenſions would be better founded than I hope they are: but falſehoods, and groundleſs malicious invectives ſwarm in every line of them. The beſt political, as well as natural conſtitutions, are ſubject to fevers; but prudence and the bark conjure them down again. I foreſee nothing but a few dark clouds, which are always flying under the bright azure ſky of all free governments, and rather tend to purify the air, than to corrupt it: and we are bleſt with a King, acknowledged by all parties, ranks, claſſes, and colours of men, to have every virtue which dignifies human nature; and as we are told both by ſacred and prophane Hiſtory, that whole Nations have ſuffered for the iniquities of their Kings, I hope the iniquities of this Nation may be pardoned for the ſupereminent merits of its King.

" Never turn your thoughts towards any other kingdom; for whatever tranſient ſtorms may ariſe here, there is an elaſtic ſpirit in our Conſtitution which will preſerve it; and though many other

climates

climates are pleaſanter, yet no part of the earth *(f)* is, or ever was, bleſt with a Conſtitution ſo admirably fitted and adapted to ſecuring the religious and civil rights of mankind, or where the liberty and property of the Governed were ſo anxiouſly attended to. Now I am quite diſengaged, I often wiſh myſelf with you; and if it was not ſo very long a voyage, and ſuch a fiery air, I ſhould certainly venture at it; but I muſt wait the time appointed by God for your return, and weary him with prayers for your ſafety!"

To his ſon at Oxford.

"6th July 1770.

"I hope my letter reached you time enough for you to preſent a Petition *(g)* to the Archbiſhop of Canterbury, as I find Mr. Juſtice Blackſtone concurs with the Warden as to the propriety of it, and your not doing it might look like pride, which of all the vices that diſgrace human nature, I do the moſt deteſt, as the moſt unbecoming a gentleman and a Chriſtian; and indeed I am ſo much indebted to humility for my own advancement, that I ſhould be the moſt ungrateful perſon in the univerſe, if I ever ſacrificed myſelf, or

(f) In a letter to the Reverend H. Michell, vicar of Brighthelmſtone, 31ſt March 1779, he ſays:

"Our public affairs look much better than they did all over the globe. The purity of the Chriſtian religion is certainly better preſerved here than in any other country; and though the tranſgreſſions of individuals are numerous and great, yet I truſt in God, that our enemies will not be permitted to triumph over us, and to annihilate a Conſtitution, the beſt calculated to advance the temporal and ſpiritual happineſs of a people, that ancient or modern prudence has yet introduced upon the earth!

"Your very ſincere, &c.

"E. WILMOT."

(g) This was in conſequence of an Appeal to the Archbiſhop of Canterbury, as viſitor of All-Souls College, his ſon having been elected fellow of that ſociety, in preference to one who was of the founder's kindred.

encouraged any of my children to ſacrifice, an atom of incenſe to that inſolence and haughtineſs which disfigure a great genius, and totally damn a little one. It would be improper in me to ſpeak to the Archbiſhop, and I am perfectly ſatisfied, that whatever he does, will be juſt and right; and a placid ſubmiſſion becomes a man that has been dipped in, or even ſprinkled with, literature. If you muſt quit All-Souls, you muſt reconcile yourſelf to the diſappointment by my medicine of an interpoſing Providence, who knows our ignorance in aſking, and always provides better for us than we deſerve."

To the Same.

" 27th September 1771.

" I pray all good things, firſt to you, and then to the Warden and fellows of All-Souls *(h)*. May the light of the Goſpel illuminate their chapel, and the maſter ſpirits of all ages dance every night in their library!

I regret my departure as much as it can be regretted; for there is ſuch an earneſt of the ſtate of heaven, in the undiſturbed quiet of a college, and that perpetual triumph which ſtudy and contemplation give over pride, vanity, and ambition; and it is ſo diſengaged from all worldly cares and avocations, which fret the mind and cloud the beſt of tempers, that it is impoſſible for a ſoul, believing in Chriſt, and wiſhing to attain the bliſs which that belief promiſes, not to pant after a courſe of life, leading more directly to it, than any I have yet eſſayed. The Warden *(i)* has a gentleneſs of manners about him which I admire in all, but more particularly in a meſſenger of peace. I ſhould like to ſpend my whole vacation at Oxford; but you will

(h) This letter was written after a viſit to All-Souls College, where he attended prayers, read in the library, and dined in the hall, &c. as every body elſe did.

(i) The honourable and reverend doctor Tracy.

find,

find, when it is too late, that it will not be always in your power to do as you wiſh to do;—that ſpecies of beatitude is appropriated to the fellows of All-Souls *(k)*!"

To the Same.

"I have read over your letter very attentively, and I applaud you extremely for the careful ſurvey and ſtrict examination you have made of your legal ſituation. Nothing contributes more effectually to a proficiency in any Science than a reviſion of the progreſs already made in it. I perceive you ſtart at the "acies oculorum," that will be ſoon upon you; and your apprehenſions are well founded; for you will certainly be called forth ſooner than could be wiſhed, and it may perhaps be moſt prudent to poſtpone your call to the Bar.

"You know my ſentiments on the life to be led at the Temple for the attainment of legal knowledge. Three years ſevere Study lays in a competent ſtock to work upon, and Practice alone will faſhion and inſtruct you in the management of it; for though gigantic parts will give great ſuperiority, yet I have never known nor heard of great excellence in the knowledge of the Common Law, without great pains taken at ſome time or other by the poſſeſſor of it. The Law is a miſtreſs not to be won by ſlight, tranſient, "paſſagere" viſits, but by a ſteady, unremitting purſuit, and an undaunted perſeverance in the attack, againſt all denials: ambition and neceſſity are the great

 ſupports

(k) He left a dozen large Greek Teſtaments in the chapel of the college, for the uſe of the ſociety, who ordered the following Inſcription to be inſerted in them:

Pro ſingulari ſua
Erga Chichleianos benevolentiâ,
D. D.
Honoratiſſimus & ornatiſſimus vir,
J. EARDLEY WILMOT, eq. aurat.

ſupports of it; but if you cannot get one of the firſt prizes, "honeſtum eſt in ſecundis tertiiſve conſiſtere," and the powers of your mind are certainly equal to every part of the ſtudy, nay, even to the ſubtleties of it; but you muſt not expect, that refinements, not drawn from the natural reaſon of man, ſhould remain imprinted on your mind in the ſame large, legible characters as the precepts of morality. Nobody expects that a young man, who has not been in ſome precedent practice and habits, ſhould "emane" a Lawyer in the firſt inſtance. Great allowances are made, by the Bar and the Bench, and an Audience; and even ignorance eſcapes, under the veil of a preſumed modeſty, which good nature throws over every man, (that is not a coxcomb) in his novitiate. You complain of an "inedia verborum"—the beſt receipt for that complaint, is reading Engliſh books of the moſt claſſical kind, and a total abſtinence from all other languages, except when you turn them into Engliſh, or rather paraphraſe them. I have often known too much Latin and Greek, or French, almoſt extinguiſh the "ſtumen" and "copia dicendi" in Engliſh; but habituating yourſelf to correct modes of thinking, will generally produce clear, and luminous modes of expreſſion: if the ſpring be clear, the ſtream will be ſo too, if other languages do not check or diſturb it, or if too great an anxiety for a choice diction do not interrupt it. Put-caſe clubs, and ſeizing all opportunities of ſpeaking upon all ſubjects you underſtand, will unlock the ſtorehouſe of words, coin your ideas, and give that currency and profluence which you at preſent want. The advice given to St. Paul ſhould be ever in your thoughts:

"Μὴ φοβῦ, ἀλλὰ λαλει, καὶ μὴ σιωπήσης."

"There are two things you muſt inviolably adhere to in any plan of Study: 1ſt. Not going out in a morning, except from inevitable neceſſity. 2dly. Not keeping your chamber door open, which is worſe

worſe than going out; becauſe it expoſes you to the idleneſs and impertinence of all who do, and does not even leave you to the choice of your own company. Six hours in the morning appropriated to Law, with a Voluntary played upon it by me in an evening, or before dinner for one hour, would impregnate your mind ſo thoroughly, that it would keep the odour as long as you choſe to practiſe it, either iſoterically or exoterically; for I know from experience, that the doſes I took of Lord Coke, about forty years ago, operate to this day.

" The ſong in Comus, to Virtue, is equally applicable to Law:

> " Who wins her height muſt patient climb,
> " The ſteps are peril, toil, and care."

On the ſubject of Education, he thus expreſſed his ſentiments to one of his family:

" The ſooner my grandſon goes to ſchool, the better; the longer I live, the more miſchief and miſery I ſee from miſſing an education: for happineſs does not depend upon fortune, but upon a mind well diſciplined in youth, and capable of finding employment and amuſement within its own reach, independent of all extraneous reſources.

" Obedience is one of the capital benefits ariſing from a public Education; for though I am very deſirous of having young minds impregnated with claſſical knowledge, from the pleaſure I have derived from it, as well as the utility of it in all ſtations of life, yet it is but a ſecondary benefit in my eſtimation of Education: for, to break the natural ferocity of human nature, to ſubdue the paſſions, and to impreſs the principles of religion and morality upon the heart, and give habits of obedience and ſubordination to paternal as well as political authority, is the firſt object to be attended to by all ſchoolmaſters, who know their duty and do it.

**** " J. EARDLEY WILMOT."

THE

THE Editor had not intended, when he began, to tranſcribe ſo large a portion of theſe Letters. They are a ſmall part only of thoſe in his hands, and are on ſubjects ſo intereſting to all fathers, and to all ſons; and they pourtray the genuine character of an excellent father, and a virtuous man, ſo much more faithfully and emphatically than any narrative, that the reader will undoubtedly think them a very valuable part of theſe Memoirs.

His retreat from buſineſs not only procured him eaſe and health, but probably added many years to his life. No one ever more completely enjoyed "otium cum dignitate." His firſt employment in a morning was to read and ſtudy a chapter or two in the Greek Teſtament. Anatomy was one of his favourite purſuits during his retirement, and with this view he regularly attended the Lectures of the celebrated Dr. Hunter.

He was in the habit of entering in his common-place book the death of his friends and contemporaries, with a ſhort account of them. It will be a further illuſtration of his own character, to obſerve how ready he was to do juſtice to the worth of others.

"On the 30th of March 1773, Thomas Anſon, eſquire, of Shuckborough, in the county of Stafford, departed this life: he was the elder brother of lord Anſon, who died without iſſue, and inherited his great acquiſitions. He was never married, and, in the former part of his life, had lived many years abroad; was a very ingenious, polite, well-bred man, and dignified all his natural and acquired accompliſhments by his univerſal benevolence and philanthropy."

"On the 18th March 1774, died Mr. Baron Adams upon the circuit at Bedford, in the ſixty-fourth year of his age. Doctor Petty reported that he died of the gaol diſtemper, caught at the Old Bailey, where he attended about a fortnight before. He was a very good Lawyer, and an excellent Judge, having every quality neceſſary

to dignify that character: I never ſaw him out of humour in my life, and I knew him intimately for forty years."

" John Ryder, Archbiſhop of Tuam, died 4th February 1775, in the ſeventy-eighth year of his age. He married Alice, daughter of John Wilmot, one of the younger ſons of Robert Wilmot, of Oſmaſton, in the county of Derby, eſquire, and by her had two ſons and four daughters. He was a very humane, generous, benevolent, and beneficent man; a good huſband, maſter, father, and valuable friend. He was affable, courteous, and obliging to every body, and his patronage, protection, and aſſiſtance, were open to all who deſerved them; and though he practiſed every Chriſtian virtue himſelf, he could look over human infirmities in others. In all reſpects he was a very excellent man."

" 15th February 1780, Mr. Juſtice Blackſtone departed this life. He was a very good Lawyer; and the Commentaries he publiſhed, will embalm his name to all poſterity! He was a very honeſt man, and a firm and ſteady friend to the Conſtitution, in Church and State."

As theſe however muſt be conſidered as the private teſtimonies of eſteem and friendſhip, a few of them only are tranſcribed. The eminent perſon laſt-mentioned, ſir William Blackſtone, received ſome hints from ſir Eardley on his Commentaries, as appears by the following letters.

Carey-ſtreet, 22d February 1766.

" Sir,

" Lord Mansfield did me the honour to inform me, that both you and himſelf had been ſo obliging as to mark out a few of the many errors, which I am ſenſible are to be met with in the Book which I lately publiſhed. Nothing can flatter me ſo much as that you have thought it worth the pains of ſuch a reviſal. As my Book-

ſeller

ſeller is urgent with me for a ſecond impreſſion, I muſt entreat the favour of you to appoint ſome hour previous to the Circuit, when I may wait upon you to receive your obſervations, which will be attended to with great deference and gratitude by,

" Sir,

" Your moſt obedient, &c.

" W. Blackstone."

" Mr. Blackſtone preſents his reſpects to Mr. Juſtice Wilmot, and has preſumed to make uſe of the indulgence he was pleaſed to give him, by ſubmitting to his private inſpection his Lectures on Real Property (which will be ſoon followed by thoſe on Perſonal Property) intreating the favour of him to return this Volume when peruſed, after noting in the margin ſuch errors of the groſſer kind as he may happen to obſerve, that Mr. Blackſtone may correct them, by cancelling the leaves, before the Book is publiſhed.

" Carey-ſtreet, 2d May 1766."

Sir Eardley had a ſevere illneſs in the ſpring of 1780, which terminated in a Jaundice of the worſt kind; and being ſent to Bath by ſir Noah Thomas, his life was long deſpaired of, till by taking a medicine which he there met with, he was reſtored to his family.

The following is an extract from ſir Eardley's own account of this illneſs. " I was taken ill of the Jaundice the firſt week in March 1780, and after ſome time went to Bath; being given over by the Phyſicians, I was reſtored to health by a medicine adminiſtered to me there by Mrs. Bull." He then mentions ſome particulars of the medicine, and the progreſs of his recovery; and adds, " I cannot cloſe this ſhort, imperfect account of my illneſs, without acknowledging

ing my great obligations to my two daughters *(l)*, who accompanied me to Bath, for their great care and attention to me, to whom, under God's great goodneſs, I think I owe my life."

From Bath he went to Brighthelmſtone, in the beginning of June, and was no ſooner arrived there, than the accounts followed him of the Riots in London; on the reports being brought to him every day of the increaſing tumults and miſchief, he declared, with unuſual warmth, that "he thought it impoſſible there could be one Soldier "or one Lawyer in London; for if there were, the Riots would not "have been ſuffered to get to ſuch a height."

(l) It may not be impertinent here to mention, that his eldeſt daughter, MARY MAROW, wife of the right honourable lord Eardley, ſurvived her father about two years. She is buried at Berkſwell, in the county of Warwick. The following is her epitaph:

Sacred to the memory
of MARY MAROW, wife of the right honourable lord Eardley,
And eldeſt daughter of ſir John Eardley Wilmot, Knt.
Lord Chief Juſtice of the court of Common Pleas.

Her conduct,
in all the various relations of life,
was ſo eminently diſtinguiſhed,
that Providence ſeemed to have raiſed her up,
as an example
to the age in which ſhe lived,
that rank and fortune may be enjoyed
with the pureſt innocency of life,
and the unremitting exerciſe of
every Chriſtian virtue.

She died, univerſally lamented, 1ſt March 1794,
aged 48, and lies here interred.
This memorial of affection and ſorrow
is erected by her ſurviving huſband.

From this time to March 1786, ſir Eardley had a tolerable ſhare of health: at this period, he was attacked by a violent fever, with the moſt alarming ſymptoms; but by the ſtrength of his conſtitution, and the great ſkill and attention of his phyſician, ſir Richard Jebb, he was enabled to remove into the country, and gradually recovered from the immediate effects of it. He can hardly however be ſaid to have lived, or at leaſt to have enjoyed any degree of health, or comfort, after this attack, except ſuch as aroſe from the attention of his children, the contemplation of a well-ſpent life, and that firm, but humble confidence in a joyful Reſurrection, which Chriſtianity alone inſpires.

After having thus paſſed a life of advantage to the Public, and of great delight to his family and friends, he died, on the 5th of February 1792, aged eighty-two.

He left his eldeſt ſurviving ſon his ſole Executor, with expreſs directions, in his own hand writing, for a plain marble tablet to be put up in the church of Berkſwell, in the county of Warwick, with an Inſcription, containing an account of his birth, death, the dates of his appointments, and names of his children, "without any other addition whatever." Sir Eardley always conſidered epitaphs as of little uſe, except in furniſhing evidence of facts and dates, in which reſpect he had often found them of conſiderable importance in the courſe of his profeſſional experience.

AFTER this narrative of the Life of ſir Eardley Wilmot, it ſeems almoſt ſuperfluous to expatiate on his character. His perſon was of the middle ſize; his countenance of a commanding and dignified aſpect; his eye particularly lively and animated, tempered with great ſweetneſs and benignity. His knowledge was extenſive and profound, and perhaps nothing but his natural modeſty prevented him from equalling the greateſt of his predeceſſors. It was this invincible

modeſty which continually acted as a fetter upon his abilities and learning, and prevented their full exertion in the ſervice of the Public. Whenever any occaſion aroſe, that made it neceſſary for him to come forward (as was ſometimes the caſe in the Houſe of Lords, in the Court of Chancery, and in the Common Pleas) it was always with reluctance, to perform a duty, not to court applauſe, which had no charms for his pure and enlightened mind.

But although he was never fond of the practice of the Law as a Profeſſion, he often declared his partiality for the ſtudy of it as a Science: as an inſtance of this, after he had reſigned his office, he always bought and read the lateſt Reports, and ſometimes borrowed manuſcript notes from young Barriſters.

He was not only accompliſhed in the Laws of his own Country, but was alſo well verſed in the Civil Law, which he ſtudied when at Trinity Hall, Cambridge, and frequently affirmed, that he had derived great advantage from it in the courſe of his Profeſſion. He conſidered an acquaintance with the principles of the Civil Law as the beſt introduction to the knowledge of Law in general, as well as a leading feature in the Laws of moſt nations of Europe.

His knowledge however was by no means confined to his Profeſſion. He was a general Scholar, but particularly converſant with thoſe branches, which had a near connection with his legal purſuits, ſuch as Hiſtory and Antiquities. He was one of the original Fellows of the Society of Antiquaries, when firſt incorporated in 1750, and frequently attended their meetings, both before and after his retirement; moſt of his leiſure hours were ſpent in the above reſearches.

But of all the parts of ſir Eardley's character, none was more conſpicuous than the manner in which he conducted himſelf on the Bench, in that moſt delicate and important office of hearing Cauſes, either of a criminal or civil nature: he was not only practically ſkilled in his Profeſſion, but his penetration was quick and not to be

eluded; his attention conſtant and unabated; his elocution clear and harmonious; but above all, his temper, moderation, patience, and impartiality, were ſo diſtinguiſhed, that the parties, ſolicitors, counſel, and audience, went away informed and ſatisfied, if not contented—"etiam contra quos ſtatuit, æquos placatoſque dimiſit." This was the caſe in queſtions of private property: but where any points of a public nature aroſe, there his ſuperior abilities and public virtue were eminently characterized; equally free from courting miniſterial favour, or popular applauſe, he held the ſcale perfectly even between the Crown and the People, and thus became equally a favourite with both. This was conſpicuous on many occaſions, but particularly in the important Cauſe, related before, between Mr. Wilkes and lord Halifax, in 1769.

In private life, he likewiſe excelled in all thoſe qualities that render a man reſpected and beloved. His watchfulneſs, tenderneſs, and condeſcenſion as a parent, the Letters in theſe pages will abundantly teſtify. May the remembrance and contemplation of his virtues inſpire his Deſcendants with a deſire to imitate them! This he would have thought the moſt grateful reward, this the nobleſt Monument! Such unaffected piety, ſuch unblemiſhed integrity, ſuch cheerfulneſs of manners, and ſprightlineſs of wit, ſuch diſintereſtedneſs of conduct, and perfect freedom from party ſpirit, could not, and did not, fail of making him beloved, as well as admired, by all who knew him. Genuine and uniform humility was one of his moſt characteriſtic virtues. With ſuperior talents from nature, improved by unremitting induſtry and extenſive learning, both in and out of his Profeſſion, he poſſeſſed ſuch native humbleneſs of mind and ſimplicity of manners, that no rank nor ſtation ever made him think highly of himſelf, or meanly of others. In ſhort, when we contemplate his various excellencies, we find ourſelves at a loſs whether moſt to admire his deep and extenſive learning and penetration as a Lawyer, his induſtry, probity,

probity, firmneſs, wiſdom, and patience as a Judge, his taſte and elegant accompliſhments as a Scholar, his urbanity and refined ſentiments as a Gentleman, or his piety and humility as a Chriſtian. But when we approach nearer and view him in the ſhade of private life, then we may confidently aſſert, that he has left an illuſtrious and encouraging example of the progreſs which man, with all his frailties, may make in the attainment and exerciſe of thoſe virtues and graces, of which the great Teacher and Saviour of mankind condeſcended, in his own perſon, to exhibit the perfect and inimitable pattern!

FINIS.

Printed by Luke Hanfard,
Great Turnſtile, Lincoln's-Inn Fields.

NOTES

OF

OPINIONS

AND

JUDGMENTS,

&c.

OPINIONS AND JUDGMENTS,

BY

LORD CHIEF JUSTICE WILMOT.

IN CHANCERY.

The ATTORNEY GENERAL, at the Relation of the UNIVERSITY of CAMBRIDGE, againſt - - - - } LADY DOWNING and others.

1767. Attorney General againſt Lady Downing and others.

v. Ambler, 550, & 3 Veſey, jun. 714.

SIR GEORGE DOWNING, of Gamlingay, in the County of Cambridge, Baronet, being ſeiſed of, or otherwiſe entitled in fee-ſimple to divers freehold, copyhold, and leaſehold eſtates, in the counties of Cambridge, Bedford, and Suffolk, by his will, bearing date the 20th of December 1717, gave and deviſed all his manors, lands, tenements, and hereditaments, both freehold and copyhold, as well as leaſehold for years, ſituate, lying, and being, in the ſeveral counties of Cambridge, Bedford, and Suffolk, and elſewhere, with their rights, members, and appurtenances, unto JAMES Earl of SALISBURY, CHARLES Earl of CARLISLE, the honourable NICHOLAS LECHMERE, Chancellor of the Dutchy of Lancaſter, JOHN PEDLEY and ROBERT PULLYN, eſquires, To hold all ſuch of the ſaid manors, hereditaments, and premiſes, whereof he was ſeiſed of any eſtate of

 inheritance,

Attorney General againſt Lady Downing and others.

inheritance, or freehold, unto them and their heirs, upon the uſes, truſts, intents, and purpoſes in his ſaid will after declared, limited, and appointed, concerning the ſame; and to hold all ſuch of the ſaid manors, hereditaments, and premiſes, whereof he had any eſtate for any term or terms of years, unto the ſaid truſtees, their executors and adminiſtrators, upon the uſes, truſts, and purpoſes, therein likewiſe after declared, limited, and appointed, concerning the ſame: And he did by his ſaid will limit and appoint all ſuch of his ſaid manors and hereditaments, whereof he was ſeiſed of any eſtate of inheritance or freehold, to the uſe of his couſin JACOB GARRET DOWNING, ſon and heir apparent of his uncle CHARLES DOWNING, for the term of his natural life, without impeachment of waſte; and immediately from and after the determination of that eſtate, to the uſe of the ſaid truſtees, and their heirs, to preſerve contingent remainders; and from and after the deceaſe of him the ſaid JACOB GARRET DOWNING, to the uſe of the firſt ſon of the body of the ſaid JACOB GARRET DOWNING, in tail male; and for default of ſuch iſſue, to the uſe of the ſecond, third, fourth, fifth, and every other ſon and ſons of the body of the ſaid JACOB GARRET DOWNING, ſeverally and ſucceſſively in tail male; and for default of ſuch iſſue, to the uſe of the ſecond, third, fourth, fifth, and every other ſon and ſons of the body of the ſaid CHARLES DOWNING, ſucceſſively in tail male; and for default of ſuch iſſue, to the uſe of THOMAS BARNARDISTON, of Bury St. Edmund's, in the county of Suffolk, eſquire, ſon and heir apparent of his aunt ——— BARNARDISTON, wife of THOMAS BARNARDISTON, during the term of his natural life, without impeachment of waſte; remainder to truſtees, to preſerve contingent remainders; remainder to the uſe of his firſt and other ſons

ſucceſſively

Attorney General againſt Lady Downing and others.

ſucceſſively in the ſame manner; and for default of ſuch iſſue, to the uſe of his couſin CHARLES PETERS, then or late of the Univerſity of Oxford, for the term of his natural life, without impeachment of waſte; and immediately after the determination of that eſtate, to the uſe of the ſaid truſtees, to preſerve contingent remainders; and immediately from and after the deceaſe of the ſaid CHARLES PETERS, to the uſe of the firſt and other ſons of the body of the ſaid CHARLES PETERS, in the ſame manner; and for default of ſuch iſſue, to the uſe of his couſin JOHN PETERS, then or late of the ſame Univerſity, brother of the ſaid CHARLES PETERS, during the term of his natural life, without impeachment of waſte; and from and immediately after the determination of that eſtate, to the ſaid truſtees, to preſerve contingent remainders; and immediately after his deceaſe, to the uſe of the firſt and other ſons of the body of the ſaid JOHN PETERS, in the ſame manner; and for default of ſuch iſſue, to the uſe of the ſaid truſtees, and their heirs, in truſt, "That they do and ſhall, ſo "ſoon as may be, by, with, and out of the rents, iſſues, and profits "of the premiſes, buy and purchaſe the inheritance and fee-ſimple "of ſome piece of ground, lying and being within the town of Cam-"bridge, proper and convenient for the erecting and building a Col-"lege, and thereon ſhall erect and build all ſuch houſes, edifices, and "buildings, as ſhall be fit and requiſite for that purpoſe; which Col-"lege ſhall be called by the name of DOWNING College; and my will "is, that a CHARTER-ROYAL be ſued for and obtained for the founding "of ſuch College, and incorporating a body collegiate by that name, "in and within the Univerſity of Cambridge, which College or col-"legiate body, ſhall conſiſt of ſuch head or governors, and of ſuch "fellows, ſcholars, members, and other perſons for the time being,

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" and ſhall be maintained, governed, and ordered by ſuch laws, " rules, and orders, and in ſuch manner, and therein ſhall be pro- " feſſed and taught ſuch uſeful learning as my ſaid truſtees, or their " heirs, by and with the conſent and approbation of the moſt reve- " rend the archbiſhops of Canterbury and York, and the maſters " of Saint John's College and Clare Hall, in the ſaid Univerſity of " Cambridge, in being at the time of the founding of the ſaid college, " ſhall direct, preſcribe, and appoint; and immediately from and " after the founding and incorporating ſuch College or body colle- " giate as aforeſaid, the ſaid" truſtees, " and their heirs, ſhall ſtand " and be ſeiſed of all and ſingular the ſaid manors, lands, tenements, " and hereditaments, in truſt for the ſaid collegiate body and their " ſucceſſors for ever." And as for and concerning ſuch of the ſaid manors, hereditaments, and premiſes, whereof he was poſſeſſed of any eſtate for term or terms of years, he declared and appointed that the ſaid truſtees, and their executors and adminiſtrators, ſhould from time to time aſſign and convey the ſame unto ſuch perſon and perſons as ſhould be entitled to the actual poſſeſſion of his ſaid lands of inheritance, by virtue of the limitations thereof in his ſaid will before mentioned: provided always, that if any of the ſaid lands and premiſes ſhould come to or be veſted in any male perſon or perſons, whoſe ſurname ſhould not be DOWNING, then ſuch perſon or perſons ſhould thenceforth take the name of DOWNING only; and upon refuſal or neglect to take the ſaid ſurname of DOWNING in manner aforeſaid, then the uſes and limitations to the perſon or perſons ſo refuſing or neglecting, to be void, and the premiſes to go and remain to ſuch perſon and perſons, and to ſuch uſes, as the ſame would or ſhould do by virtue of any of the limitations before mentioned, in caſe the

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perſon or perſons ſo refuſing or neglecting to take the ſurname of DOWNING had been naturally dead; and as for his perſonal eſtate, he gave all his goods and chattels unto his ſaid couſin JACOB GARRET DOWNING, whom he conſtituted ſole executor of his will. By a codicil to his will, the ſaid teſtator gave two annuities, and charged all his lands with the payment thereof.

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The teſtator, Sir GEORGE DOWNING, died on the 20th of June 1749, without iſſue, leaving Sir JACOB GARRET DOWNING his heir at law, who entered upon the freehold, copyhold, and leaſehold eſtates of the teſtator, and enjoyed them till his death in 1764. He never had any iſſue; and THOMAS BARNARDISTON, CHARLES PETERS, and JOHN PETERS, died in his life-time, without having had any iſſue; nor was there any other ſon of CHARLES DOWNING, or of the teſtator's aunt, ——— BARNARDISTON. All the truſtees died in the life of the teſtator Sir GEORGE DOWNING.

Sir JACOB GARRET DOWNING, by his will, dated the 12th of Auguſt 1763, gave to his wife, Lady DOWNING, and to her heirs, executors, adminiſtrators, and aſſigns, all his real and perſonal eſtate, charged with the payment of ſeveral legacies and annuities, and appointed her ſole executrix. Upon his death in 1764, ſhe entered upon all the freehold, leaſehold, and copyhold eſtates, deviſed by Sir GEORGE DOWNING.

On the 9th of May 1764, the Information was filed againſt Lady DOWNING, and the heirs at law of Sir JACOB GARRET DOWNING, and the other proper parties; praying that the will of Sir GEORGE DOWNING might be eſtabliſhed, and the truſts thereof carried into execution; that an account might be taken of the money received by Lady DOWNING from the rents and profits of the ſaid freehold, copyhold.

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copyhold, and leaſehold eſtates, become due after the death of Sir JACOB GARRET DOWNING, and that a Receiver might be appointed.

This cauſe was heard before the Lord Chancellor CAMDEN, aſſiſted by Sir THOMAS SEWELL, Maſter of the Rolls, and Lord Chief Juſtice WILMOT, on the 19th and 27th of May, and the 18th of July 1767; and on the 17th of June 1768, Lord Chief Juſtice WILMOT delivered his opinion as follows:

THIS CASE, on which your Lordſhip has done me the honour of aſking my opinion, comes before the Court upon an Information, brought by his Majeſty's Attorney General, to have an execution of the truſts of the will of Sir GEORGE DOWNING; and in order to deliver my ſentiments to your Lordſhip with as much perſpicuity as I can, I will, firſt, very ſhortly ſtate the caſe, and then mention the queſtions, under which I mean to conſider it.

Sir GEORGE DOWNING, ſeiſed of an equitable eſtate in fee, and having ſeveral relations, by his will, 20th December 1717, deviſes all his manors, meſſuages, lands, tenements, and hereditaments, to five truſtees and their heirs, to the uſe of his nephews and other relations, and their iſſue male, in ſtrict ſettlement; and for default of ſuch iſſue, he directs that his truſtees ſhould buy a piece of ground in Cambridge, and build a College upon it, to be called DOWNING College; and that a CHARTER-ROYAL ſhould be ſued for and obtained for the founding ſuch college, and incorporating a body collegiate by that name, in and within the Univerſity of Cambridge, to conſiſt of ſuch perſons, and to be governed by ſuch rules, and to profeſs and teach ſuch uſeful learning therein, as his truſtees, or their heirs,

with the conſent of the archbiſhops of Canterbury and York, and the maſters of St. John's and Clare Hall, in being at the time of founding ſuch College, ſhould direct and appoint; and immediately after ſuch foundation, he directed that his truſtees ſhould ſtand ſeiſed in truſt for ſuch collegiate body and their ſucceſſors for ever. He then directs, that ſuch of the perſons in the ſucceſſion, whoſe ſurnames were not DOWNING, ſhould take that ſurname upon them; and makes JACOB GARRET DOWNING, who was the firſt perſon named in the ſucceſſion, his executor.

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Sir GEORGE died the 10th of June 1749, thirty-two years after making the will, and the five truſtees all died in his life-time, and conſequently the deviſe to them, whether of the legal or equitable eſtate, became a lapſed deviſe.

The deviſees named in the will, are alſo all dead without iſſue male, and the preſent Information is now brought, at the relation of the Chancellor, maſters, and ſcholars of the Univerſity of Cambridge, againſt the deviſee and heirs at law of Sir JACOB DOWNING, who was heir at law of Sir GEORGE DOWNING, and againſt the two archbiſhops and the maſters of St. John's and Clare Hall, for the eſtabliſhing the will of Sir GEORGE DOWNING, to have the truſts thereof performed and carried into execution, and for directions relating thereto.

The defendant, Lady DOWNING, the deviſee of Sir JACOB DOWNING, who was the heir of Sir GEORGE DOWNING, inſiſts, by her Anſwer, that ſhe is entitled to the inheritance of the eſtates deviſed by the will of Sir GEORGE DOWNING, and that the truſts for founding and endowing a College are void.

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The heirs at law put in the common Anſwer, claiming the eſtates, if the wills are not well proved.

The archbiſhops, and maſters of St. John's and Clare Hall, by their Anſwers, declare they are ready to act, as this Court ſhall judge proper, for the founding and eſtabliſhing a College, according to the directions of the will of Sir GEORGE DOWNING.

I think every thing urged at the bar in this Cauſe will fall under three general queſtions.

1. Firſt, whether the truſts are illegal and void.

2. Second, if not illegal and void, whether they are of ſuch a nature, as that a Court of equity, under the particular circumſtances of this caſe, ought to aid and aſſiſt them, or leave them where they lie, or at leaſt not interpoſe till a College is incorporated, and a licence to take in mortmain is obtained.

3. Third, ſuppoſing the truſts illegal and void, or of ſuch a nature as not fit to be carried into execution by a court of equity, whether this court will apply the eſtate to ſome other charity, *ejuſdem generis*, and as near the teſtator's intention as the rules of law and equity will permit.

1. As to the firſt queſtion,

It is agreed, that this deviſe in the will is not affected by the 9 Geo. II. which paſſed in 1736, nineteen years after making the will, and indeed Aſhburnham's caſe *(a)*, which was ſaid in that caſe to be warranted by an antecedent determination of a ſimilar nature on the ſtatute of frauds, has ſettled the law on this point; and therefore, if the truſt was not illegal and void when the will was made, that ſtatute will not make it ſo; but it muſt be conſidered exactly

(a) Aſhburnham v. Bradſhaw, 2 Atk. 36. Barnard. Ch. Rep. 6.

exactly in the ſame manner as it muſt have been if that ſtatute had never been made.

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I will conſider the uſe made of that ſtatute, againſt this Court's ſupporting or reviving the truſts, under the ſecond queſtion, as I wiſh to keep the queſtions ſeparate, and not to confound reaſons, which apply to the *diſcretion* of the Court againſt *executing* the truſt, with reaſons urged to evince the *illegality* of it.

In order to examine the legality of this truſt, it is neceſſary to enquire, how the law ſtood, before the 9th Geo. II. was made, as to alienations in mortmain? And they were certainly firſt prohibited to be made to the clergy by conditions inſerted in the deeds of private perſons. Magna charta was the firſt public legiſlative injunction againſt them.

It was the intereſt of the king and the lords, in reſpect of the tenures, and for the benefit of the community, to check them.

The 7th of Edward I. extended the prohibition to all ſecular and lay corporations as well as religious, and was intended to prevent all devices, by which lands might be got into their hands.

13th Edward I. c. 32. guards againſt colluſive recoveries.

18th Edward I. *Quia emptores terrarum*, repeats the general prohibition to prevent any conſtruction or inference being drawn from that ſtatute in their favour.

15th Richard II. c. 5. puts uſes exactly in the ſame predicament as legal eſtates.

But it is obſervable, that theſe alienations in mortmain were never made void, ſo as to let in the grantors or their heirs at law, but the laws only gave a right to the meſne lords and the king to ſeize

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them as forfeited; and, therefore, if they remitted their right, the alienation was good; and that option produced thoſe diſpenſations with theſe laws, called Licences to alien in mortmain, which continued till the Revolution, and were revived again by 7 & 8 William III. c. 37, and are ſo fully ſanctified by that act, that it would be a vain and futile diſquiſition, either to run through the hiſtory of thoſe licences, and trace their progreſs from their commencement, or to examine the legality of them upon the principles of the Conſtitution. It is ſufficient to ſay, that, except in the interval between the Bill of Rights and the 7 & 8 Wm. III. c. 37, a power of alienating in mortmain with licence has always been an exerciſed power of property, and that ſtatute of 7 Wm. III. ſhews it to be the ſenſe of the legiſlature, that it was fit it ſhould continue ſo. And alienations in mortmain differed very materially from alienations to ſuperſtitious uſes, prohibited by the 23d Hen. VIII. c. 10; for they are declared to be utterly void, and of no virtue, ſtrength, or effect in law; and if eſtates given to ſuch uſes had not been afterwards given to the king, the grantors and their heirs, in conſequence of the nullity, would have been let into the eſtates: whereas the grantors and their heirs were bound by alienations in mortmain, and the lords and the king only could avoid them.

And before the ſtatute of Wills, where there was a cuſtom of deviſing, a licence was neceſſary to legitimate ſuch a deviſe, unleſs the cuſtom authorized it; and year-book, 45 Edw. III. 26. proves that poſition, where the king ſeized, becauſe the deviſe was in mortmain, and the deviſor was not ſuch a perſon, as was within the cuſtom of deviſing in mortmain, which extends only to thoſe who

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are natives and inheriting lands within the city, or reſiants and taxable to ſcot and lot *(a)*; and as the deviſor did not fall under thoſe deſcriptions, the cuſtom did not extend to him.

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The 32d Hen. VIII. c. 1. gives a general liberty of deviſing at the deviſor's free will and pleaſure, but the explanatory act of 34 Hen. VIII. c. 5. excepts bodies politic and corporate: ſo that deviſes to corporations were void; they could not be diſpenſed with, and the heir at law took the eſtate.

(a) "A ceux queux ſont nées & inherites en meſme la Citie per voye de heritage, ou que ſont reſiaunts & taxables al ſcot & lotte."

The 1ſt and 2d Ph. and M. c. 8. f. 50. took off this reſtraint in favour of ſpiritual corporations for 20 years; and Colleges were ſo much the favourites of the law at that time, that a deviſe to Trinity College, though a lay corporation, was held to be within the protection of that law, becauſe Divinity was ſtudied in it. Dyer, 255. 1 Roll. Rep. 166. 418. Hob. 122 & 123. 11 Co. 71. But when 20 years expired, ſpiritual corporations, as well as others, were incapable of taking by deviſe. And from that time to the 43d Eliz. corporations could not take by deviſe at all (except under cuſtom of deviſing in mortmain) either with licence or without it.

But then comes the ſtatute of 43 Eliz. c. 4. with ſuch medicinal qualities in it, as to heal every imperfection in a charitable diſpoſition, provided the party had a legal capacity to give at all.

The title of the Act, and the principal object in the view of the legiſlature, was to redreſs miſemployments of real or perſonal eſtates given to charitable uſes.

But the judges in queen Elizabeth's time, having in Porter's caſe, 1 Coke (which was followed by another of Martidal and Martin, Cro. Eliz. 288.) made a very favourable conſtruction of 23 Hen. VIII. in ſupport of uſes really meritorious: the judges in king James's time,

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animated with an equal ſpirit of piety, were determined to keep pace with their predeceſſors, and perhaps to go beyond them, by a moſt enlarged liberal expoſition and application of this ſtatute of 43 Eliz. I call Porter's caſe a favourable expoſition of 23 Hen. VIII. c. 10. becauſe the reaſon of the law, given in the preamble, reſpected meritorious uſes equally with ſuperſtitious ones: for the reaſon given is, that grants to ſuch uſes were as prejudicial to the king and the lords, as in caſes where lands were aliened in mortmain.

Now that loſs and inconvenience were the ſame, whether the uſe was a real pious uſe, or a ſuperſtitious one.

The words laid hold of by the Judges, in 43 of Eliz. were the words, *limited and appointed.* If there was a gift in fact, a limitation and appointment made in fact, by a perſon who had a legal capacity to give in any way, they conſidered that intention improperly executed, to be a foundation for ſupplying any imperfection in the mode of donation; and that the legiſlature intended, if eſtates were given in fact, defects in form were not to be attended to, and they were to let the charity take place.

How was this to be done? Before the ſtatute of wills, lands were not deviſable at all, and by the ſtatute of wills, they could not be deviſed to corporations, and licences in mortmain would have been neceſſary, if they could have been ſo deviſed. The judges therefore could not ſay the deviſes were good at law; and therefore they left the legal eſtate to follow the courſe of the law, but conſidered the deviſe as an equitable declaration of the truſt of the eſtate, and as a valid limitation and appointment of the *utile dominium*, which was what they thought the legiſlature had their eye upon, and meant by the 43 Eliz. to ſubject to the regulations made by that ſtatute.

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A ſtronger caſe could not well ariſe than Colliſon's caſe, in Hob. 136. and Moor 888. A deviſe made in 25 Hen. VIII. before this ſtatute of wills, of a houſe and land, not deviſable by any cuſtom, nor eſtated in uſe to any, to his wife for life, and the rents then to be employed for the repair of a highway. Decree for a highway. On appeal it was referred to Mountague and Hobart, and they were of opinion, that the intended deviſe is a limitation or appointment to a Charitable uſe, to be relieved by the 43 Eliz. and the Chancellor confirmed the decree upon exceptions taken by Rolt the heir at law, to whom that eſtate was deſcended. A moſt violent retroſpective relation, to make a deviſe void at law, a good one in effect in equity.

Flood's caſe, Hob. 136, is the deviſe of a remainder to a corporation. The judges held the deviſe to be void at law, but clearly within the relief of the ſtatute of 43 Eliz. and it was decreed, that the College ſhould enjoy it againſt the ward and his heirs. And it was ſaid *(a)*, that the proviſo, exempting Colleges, was not intended to reſtrain gifts made to them, but only to exempt them from being reformed by Commiſſion.

(a) It is ſo mentioned in the Decree.

Duke's Charitable Uſes, 77, caſe 16. The ſame doctrine laid down in favour of a deviſe to St. John's College in Cambridge.

The King and Newman, 1 Lev. 284. It was held by Lord Keeper Bridgman, that a deviſe to Trinity College was good by 43 Eliz. notwithſtanding the ſtatute of mortmain.

Theſe caſes have ſo fully ſettled, that deviſes to corporations in *eſſe*, are good appointments of the truſt in equity, notwithſtanding the ſtatutes of mortmain, and the exception of corporations in the ſtatute of wills; and this court has ſo uniformly eſtabliſhed theſe deviſes upon the ſtrength of theſe deciſions for near a century and a

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half, that it is really unneceſſary to ſpeculate minutely upon Colleges or the Univerſity being within the words of the 43 Eliz.; but I own the proviſo in the act is a ſtrong legiſlative expoſition of the extent and meaning of the word in the antecedent clauſe. For if they had not conſidered them as falling directly under the enacting clauſe, the proviſo was vain and uſeleſs; and the proviſo is by Sir T. Moore, Duke 171. taken by equity to extend to the Univerſity, which is a body politic, though Colleges only are mentioned.

And, indeed, I think Univerſities and Colleges are within the proper and genuine ſenſe and meaning of the words, "Schools of learning."

The places where the public exerciſes are performed, are called the Schools. An Univerſity is a great School, incorporated to inſtruct, by their profeſſors and regular exerciſes, all who come to ſtudy there, and by degrees to give their ſtudents rank and credit in the republic of letters, and which are qualifications for lucrative offices and employments in life. It is a public School of divinity, phyſic, law, and all arts and ſciences. And Colleges are Schools of learning, furniſhing ſcholars for the univerſal School, which is a combination of all thoſe Schools: and in any other view, than as Schools of learning, they are as uſeleſs to ſociety as Monaſteries: and therefore I think they are not only within the equity of the act, but the words of it.

And I conſider this deviſe as made for the further augmenting of the Univerſity; and for that reaſon the Univerſity, in its corporate capacity, is very properly made a Relator in this Information, being materially and eſſentially intereſted in the benefaction.

For though the Univerſity is not a corporation of Colleges, but of matriculated members, and all Colleges are diſtinct and ſeparate corporations, yet theſe Colleges attract and furniſh the members to be matriculated,

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matriculated, and every new College enlarges the univerſal School, and by increaſing the number of ſcholars, adds weight, dignity, and ſtrength to the Univerſity.

And therefore, if an object in *eſſe* was neceſſary, the Univerſity is that object in *eſſe* to take and accept this benefaction *inſtanter*, ſubject to that controuling power, which, by the fundamental law of the land, is given to the King, in reſpect of the medium through which they are to receive the benefit of it.

And the further augmenting of the Univerſities is a good and godly uſe.

1 Edw. VI. c. 14. expreſsly calls it ſo. Erecting grammar ſchools, further augmenting Univerſities, and the better proviſion of the poor and needy, are there mentioned together, as good and godly uſes, and recommended to the king's care and protection in the diſtribution of the eſtates given him by that Act.

But another objection is then made to this deviſe. That it is a deviſe to a non-entity, and that it depends both upon the conſent of the Univerſity and the Crown, whether there ever will be ſuch a being or not.

Firſt, I ſhall conſider how the law ſtands as to deviſing legal eſtates to perſons not in *eſſe*, either in poſſeſſion or remainder.

A deviſe to A. B. the firſt ſon of C. whether in poſſeſſion or remainder, is void, if there be no ſuch perſon as A. B. when the will was made; becauſe the deviſe proceeds upon a ſuppoſition, which is falſe, and the foundation of the deviſe fails as to the object. But a deviſe in poſſeſſion to a perſon not in *eſſe*, by a deſcription which manifeſts the teſtator's knowledge of his not being in *eſſe*, will be good,

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good, if the exiſtence of that perſon does not depend upon too remote a contingency.

A deviſe to the eldeſt ſon, which A. B. ſhall have, will be good as an executory deviſe, becauſe the teſtator does not mean a perſon in being, and the contingency muſt happen in the compaſs of a life: ſo a remainder to the firſt ſon of A. B. will be good, provided that firſt ſon exiſts before all the precedent eſtates are determined: and therefore, a remainder limited of the legal eſtate to a College, not exiſting, would have been void, juſt as a remainder limited to the firſt ſon of A. B. would have been void, if he had not exiſted when the preceding eſtates determined.

But executory truſts fall under a very different conſideration; for when the freehold is put into truſtees, and the *vacuum*, which the law ſo much abhors, is thereby avoided, a truſt to ariſe out of a remainder for a perſon not exiſting, but who muſt exiſt within the compaſs of a life or lives in being, will be as good, and to be ſupported by a court of equity as much, as a truſt for a perſon in *eſſe*: and therefore, ſuppoſe a remainder, limited to truſtees and their heirs, in truſt for the firſt ſon which A. B. ſhall have, and his heirs; the truſt, being in the mind and intention of the teſtator for a perſon not then exiſting, but to exiſt, and where that exiſtence muſt happen within the compaſs of a life or lives, would be clearly good. So in this caſe, the teſtator does not only declare his intention to give to a perſon not in *eſſe*, but is actually giving directions for the creation of that perſon; and there is no difference between the caſes, but that one is an executory truſt for a natural perſon to be created, and the other is for a political perſon to be created.

But

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But then it is ſaid, it depends entirely upon the pleaſure of the Crown, whether ſuch a College ſhall ever exiſt or not; and it equally depends upon the will of God, whether A. B. ſhall ever have a ſon or not: and one event may wait a whole life, whereas the will of the King may be known as well in ſix months as ſix years, allowing time for the moſt mature deliberation; ſo that the contingency is greatly within the time allowed by the law for the expecting executory truſts to ariſe.

As to the conſent of the Univerſity, if it be neceſſary, they are relators, and have thereby ſignified their conſent to the deviſe *in toto*: and perhaps the words in the will, in and within the Univerſity of Cambridge, only mean the town of Cambridge; and in common parlance, they are often uſed as ſynonimous. In Popham, 56. 57. *Academia*, and city or town, are determined to be the ſame. But I think it more probable, the teſtator meant, that his College ſhould be put upon the ſame footing, and have the ſame relation to the incorporation of the Univerſity, as the reſt of the Colleges there.

If there is nothing in the truſt to draw the condemnation of this Court upon it as illegal and void; then comes

The ſecond queſtion.

Whether the truſt is of ſuch a nature as that, under all the circumſtances of this caſe, a Court of Equity ought to give any aid or aſſiſtance towards the execution of it, or at leaſt if it is not a premature application?

The diſcretion of this Court, in the execution of truſts, is a very wide and extenſive ſubject to range over, and no exact, preciſe boundary lines can or ought to be drawn upon it.

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It is difficult to limit the extent of it with preciſion; but it muſt, like legal diſcretion, be governed, directed, and regulated by conſtitutional, legal, and equitable principles, applied to the caſe under conſideration: and therefore, unleſs there is ſome latent vice in this truſt, repugnant to theſe principles, the Court will not refuſe to execute it.

Caſes of that kind might be put, and have happened; and whether this is one of thoſe caſes, or not, is now the queſtion.

In one reſpect, this truſt comes before the Court in a much more favourable light than any which have been mentioned, or indeed, which generally have exiſted.

Diſpoſitions of this kind generally work an immediate diſinheriſon of the heirs at law, and often proceed either from minds inflamed with anger and reſentment againſt their own family, or overcaſt with gloomy and melancholy reflexions upon their approaching diſſolution.

No ſuch ingredients are to be found in this Caſe; no anger nor reſentment to his family: he has not only provided for all the male line of his family, but for ſome of his couſins deſcended from females; and he has ſubſtituted this memorial of himſelf and his family, after ſo many lines of ſucceſſion, and at ſo remote a diſtance, that the inheritance, ſubject to the antecedent limitations in the will, was of little or no value when the will was made.

And it was not any ſudden ſtart, or the effect of any cloudy diſtempered moment, for he lived two-and-thirty years after he made the will, without making the leaſt variation in this part of it: and therefore the caſe ſtands clear of all the compaſſion, which regard

for

for families, very properly and laudably, produces in all courts of juſtice.

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The 9 Geo. II. c. 36. has been urged as furniſhing a motive for this Court not to interpoſe, in two views:

Firſt: Becauſe, whatever the truſt was, in its creation, it is illegal now; and therefore this Court ought not to execute it, and ſhould regulate their diſcretion by what the law now is, and not by what it was when the will was made.

Secondly: That the deviſe of the eſtate being lapſed by the death of the truſtees, the teſtator himſelf, after the ſtatute of mortmain, could not have ſet the legal eſtate up again; and that this Court ought only to ſupply what the teſtator could have ſupplied, and ought not to call forth this legal eſtate to ſupport and ſave this truſt, which by his will the teſtator could not have done. And it was argued by Mr. Harvey, that theſe were perſonal powers to be executed only by the truſtees named in the will.

To anſwer theſe Objections, I do not think it neceſſary to give any opinion upon the operation that ſtatute would have had on this will, in caſe it had been made ſubſequent to it.

If it is to be conſidered as a deviſe in truſt for the Univerſity, (" for augmenting the Univerſity," as the 1 E. VI. expreſſes it) or, by a liberal conſtruction of the Proviſo, for a College to exiſt in the Univerſity, the truſt would be lawful now; but ſuppoſe it not within the Proviſo, and that ſuch a truſt could not now be created by will; yet if the Act, as it is admitted, do not extend to the deviſe at law, how can this Court ſay, it does extend to it in equity? for equity muſt follow the law, and the deviſe muſt be either good or void *in toto*, in both Courts.

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And if the Court ſays, they will not execute ſuch a truſt, it is exactly the ſame thing, as if they ſaid, the truſt was void. For no other Court can execute it.

I cannot ſee the leaſt difference between ſaying the truſt is void by the ſtatute, and that the ſtatute furniſhes a reaſon precluding the Court from executing it.

(a) Aſhburnham v. Bradſhaw. ub. ſup.

It is admitting the authority of Aſhburnham's caſe *(a)*, and at the ſame time denying the conſequences of it.

Giving the ſtatute a retroſpective relation and influence upon the truſt, would be breaking in upon that uniformity of judgment, which Courts of law and equity ſo anxiouſly ſtudy to preſerve in the conſtruction and execution of acts of parliament.

The Law ſays, it is a good deviſe, unimpeached by the ſtatute: Equity admits it, but ſays, I will not execute it—I will ſtand neuter, quieſcent, and inactive. Purſue the conſequences of ſuch a neutrality: the truſtees, if now living, muſt have kept the eſtate themſelves. For if it is a valid diſpoſition of the whole legal and equitable eſtate, there can be no reſulting truſt for the heir at law; or if there was, and this Court ſtands neuter, what other power in this kingdom can give that truſt any effect?

I have no ſuch idea of the juriſdiction of this Court: it is as much bound to act and decide upon a truſt eſtate, as a court of law is upon a legal one.

But it has been ſaid, the Court is not called upon to act againſt a truſtee, but againſt an heir at law.

In the firſt place, Lady Downing is not the heir at law, but the deviſee of the heir at law; and though ſhe ſtands in his place, yet in the preſent ſtate and ſituation of things, the heirs at law of the family

family are as much diſinherited by letting her keep the eſtate, diſcharged of the truſt, as by compelling a performance of it: but ſuppoſe ſhe was the heir at law, I take it to be a firſt and fundamental principle in Equity, that the truſt follows the legal eſtate, whereſoever it goes, except it comes into the hands of a purchaſer for a valuable conſideration, without notice.

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And an heir, whom the law calls, "*eadem perſona cum anteceſſore*," can never be under a leſs or more imperfect obligation to perform the commands of his anceſtors, than a mere ſtranger: and eſpecially, in a caſe where Sir JACOB DOWNING (in whoſe place Lady DOWNING now ſtands) took ſo great an intereſt in this very eſtate, ſo vaſt a fortune from the bounty of that anceſtor, whoſe commands are now diſputed. I never heard any diſtinction made, nor has any Caſe been cited to prove, that a truſt fit and proper to be executed againſt a truſtee, ſhould be ſuffered to fall to the ground, and remain unexecuted, againſt an heir at law, where there was no truſtee.

2 Vent. 349. Deviſe by an impropriator to a curate, and all who ſhould ſerve the cure after him, ſhews, that where the deviſee was incapable of taking for want of being incorporated, the Court decreed, that the heir of the deviſor ſhould ſtand ſeiſed in truſt for him.

But to avoid citing caſes on ſo plain a point, I will only refer to all the caſes which have been determined from the 43 Eliz. to this time, upon deviſes to corporations. For the words "limited and "appointed," do not carry the legal eſtate; they only operate as declarations of truſts, or gifts of the *utile dominium*, and bind the legal eſtate in the hands of the heirs at law.

And in the preſent caſe, the legal eſtate was not deviſed by the will. For by the Anſwer it appears to have been conveyed to Sir

GEORGE

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GEORGE DOWNING in 1721, four years after the will was made; and it was admitted on both ſides, that Sir GEORGE DOWNING had only an equitable eſtate, when the will was made; and therefore the queſtion cannot be varied by any lapſe of the legal eſtate, becauſe there was no legal eſtate ever deviſed, to lapſe. But, if it had been deviſed, the lapſe of the legal eſtate never has the leaſt influence upon the truſts, to which it is ſubject.

Truſt eſtates do not depend upon the legal eſtate for an exiſtence. A Court of Equity conſiders deviſes of truſts as diſtinct ſubſtantive deviſes, ſtanding on their own baſis, independent of the legal eſtate, or of one another; and the legal eſtate is nothing but the ſhadow which always follows the truſt eſtate, in the eye of a Court of Equity.

Another argument has been urged from 9 Geo. II. that the teſtator could not have ſet the legal eſtate up again after that ſtatute was made, and that this Court ought to do nothing more than what the teſtator himſelf might have done.

(*a*) 1 Vez. 178 & 186.

The caſe of Willet v. Sanford, 20th December 1748, (*a*) was cited to ſhew, that the teſtator might, by a codicil, have ſupplied the legal eſtate, but that caſe does not prove that poſition.

[His Lordſhip here ſtated the caſe.]

This caſe does not prove that the legal eſtate of the premiſes deviſed by the will, was well deviſed by the codicil to the two new truſtees, in conjunction with the three old truſtees named in the will.

But it was held by the Court, that the codicil enured, not as a revocation, but as a confirmation of the will, in reſpect of the charity: that the truſts in this will were not affected by the codicils,

except in poſtponing one nephew to another. And the operation of the codicil upon the legal eſtate, as to the two new truſtees, was not argued, nor any part of the determination.

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And the true anſwer to that objection is, that it proceeds upon preſuming, that the truſt was affected by the lapſe of the legal eſtate,—that the truſt fell with it, and that the legal eſtate muſt be ſet up again to re-animate the truſt; whereas the truſt ſtands exactly as it did, unaffected both by the lapſe and the ſtatute. And the Court is not ſetting up the legal eſtate to impart an activity to the truſt, but following the legal eſtate into the hands of the heir, inſtead of the truſtees; not ſupplying what the teſtator could not have done, but acting exactly in the ſame manner as it would have done in caſe no truſtees had been named at all, or if they all had refuſed to act in it.

And ſurely the caſualty of a lapſe of the legal eſtate, if there had been one, would have been too fine a thread to have hung this Cauſe upon. It would have been a total inverſion of the principles and practice of this Court, which makes the legal eſtate always follow the truſt, and never ſuffers the legal eſtate to lead it.

As to theſe powers being perſonal to the truſtees, and by their deaths become unexecutable; they are not powers, but truſts; and there is a very eſſential difference between them.

Powers are never imperative: they leave the act to be done at the will of the party, to whom they are given. Truſts are always imperative, and are obligatory upon the conſcience of the party intruſted.

This Court ſupplies the defective execution of powers, but never the non-execution of them: for they are meant to be optional. But the

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the perſon, who creates a truſt, means it ſhould at all events be executed.

The individuals, named as truſtees, are only the nominal inſtruments to execute that intention. And if they fail, either by death, or being under diſability to act, or refuſing to act, the conſtitution has provided a truſtee. The King, as *parens patriæ*, has the ſuperintending power over all charities, abſtracted from the ſtatute of 43 Eliz. and antecedent to it, 2 P. Wms. 119; and that paternal care and protection is delegated to this Court.

Where no truſtees are appointed at all, this Court aſſumes the office in the firſt inſtance; and in the event which hath happened, it is the ſame as if no truſtees had been appointed at all.

There is ſome perſonality in every choice of truſtees, but this perſonality is *res unius ætatis*. In perpetual charities, where the perſons, upon whom the truſt may devolve, do not exiſt, the perſonal confidence can be only in this Court; and if the truſt cannot be executed through the medium which was in the primary view of the teſtator, it muſt be executed through the medium which the Conſtitution has ſubſtituted in its place. And as a queſtion of intention, nothing can be clearer.

A College is to be founded under the eye of five truſtees. That cannot be. The death of the truſtees fruſtrates that medium.

What then? Muſt the end be loſt, becauſe the means are, by the act of God, become impoſſible? Suppoſe the queſtion was aſked the teſtator, If truſtees die or refuſe to act, do you mean no College at all, and the heirs to take the eſtate?

No—I truſt them to execute my intention! I do not put it into their power, whether my intention ſhall ever take place at all.

And

And the Attorney General and Hickman *(a)* is an authority in point, that this Court is to execute truſts as perſonal as can be created.

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The Truſt has then been attacked as not meritorious, as oſtentatious, repugnant to commercial principles, uſeleſs, and prejudicial to the public, by throwing ſo large an eſtate into mortmain.

(a) Kelynge's Select Caſes in Chan. 34.

I ſhall conſider theſe Objections ſeparately.

A Gift for the advancement of uſeful Learning is the moſt meritorious charity that can be given. Moſt charities terminate with individuals, who are the objects of them. But donations of this kind are benefactions to the whole community. They furniſh the means of bringing great parts and natural abilities out into public ſervice, and thereby become a charity not only to the perſons who are ſo helped forwards in their education, but to the whole ſociety, which reaps the benefit of thoſe parts and abilities in the ſeveral ſtations of life, where Providence places and employs them; and as Coke, in arguing Porter's caſe, ſays, "No time was ever ſo barbarous as to "take away erudition and ſcience."

All people have at all times thought it moſt meritorious to promote and encourage them. Even Omar, who directed the Alexandrian library to be burnt, did not wage war againſt uſeful learning; but thought, if the learning contained in thoſe books did not agree with the Alcoran, it was noxious; and if it did, it was uſeleſs.

It has been obſerved, that it is an oſtentatious attempt to perpetuate the Teſtator's name.

Wiſhes of this kind often influence the wiſeſt and beſt of men. There is nothing immoral in yielding to ſuch a motive, if it was the ſole and only motive of ſuch a diſpoſition. It is a paſſion implanted in the mind, as a laudable incentive to induſtry, and the reward

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promiſed Abraham for his faith: "I will make thy name great among "the nations."

The BARNARDISTONS and PETERS's *(a)* are to change their name, but that circumſtance will not affect the validity of the deviſe; and why ſhould that circumſtance be more diſguſtful in one caſe than the other? To raiſe and eſtabliſh a family in the teſtator's name and blood, was his firſt object: natural affection was the principle of that proviſion. To perpetuate his name by the medium of a College for the good of mankind, was his next object: ſocial affection was the principle of that proviſion.

(a) The deviſees in remainder prior to the eſtate to the truſtees for the charity.

Admit that vanity had ſome ſhare in both the diſpoſitions: it loſes all its malignant qualities, when it is productive of good. And in Popham, 139. aſcribing charitable gifts to vain glory and oſtentation, is ſaid to tend to a public wrong, becauſe it deters and diſcourages them; and perhaps the world owes ſome of the greateſt and nobleſt benefactions to this motive, acting in a thouſand ſhapes and forms. It is a ſpring not to be checked and ſtopped up; becauſe, under the direction of good laws, it becomes an inexhauſtible ſource of benefits to mankind: And Courts of Juſtice are not to examine, like caſuiſts, the motives of ſuch diſpoſitions, but to execute or condemn them, according to their own intrinſic merit or demerit, let them proceed from what motive they will.

Another Objection to this Charity has been, that it is uſeleſs, unneceſſary—that there are Colleges enough already, and thoſe not full.

If the College to be founded was directed to follow exactly the plan of the Colleges already eſtabliſhed, there might be more weight in this objection than the laſt. But the framing of the laws, rules,

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and orders, for the government of it, and the uſeful learning to be taught there, is left at large to the Truſtees nominally, but in reality to the two Archbiſhops, and the Maſters of St. John's and Clare Hall; under a well-grounded hope and expectation, that ſuch an eſtabliſhment would be made, and ſuch a ſyſtem of government and ſtudy introduced, as might greatly improve an academical education.

The Teſtator could not expect that the Truſtees, particularly named, ſhould ſurvive ſo many eſtates of inheritance as are limited before this deviſe was to take place, and therefore the confidence was in the Archbiſhops and Maſters, who ſhould be in being at that time. He did and might ſafely rely upon their ability and integrity to adapt and faſhion this College to the time of its foundation; to reject all the weeds and to plant all the flowers which are to be found in every other ſyſtem of education, ancient or modern, either at home or abroad.

Another Objection has been made to this Truſt, that it is repugnant to commercial principles, and prejudicial to the public, by throwing ſo much land into mortmain.

Firſt. Deviſes to charitable uſes, unincorporated, equally lock up real property: but I agree, that, in a commercial country, the circulation of real property ought not to be too much checked; and to prevent it, the Conſtitution has depoſited with the King, as a Royal Truſtee for his people, the ſole and excluſive right of making Corporations, and licenſing alienations in mortmain to them.

The King, and not this Court, is intruſted to decide upon the propriety of ſuch corporations and alienations: he will weigh the objections of throwing ſo much land out of commerce, with the advan-

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tages which may reſult to the public from the improvements ſuch a College may make in an Univerſity education, and determine in this, as in every other meaſure of his government, by that ſupreme law (from whence he never departs) the good of his people.

And this brings me to the Objection of the application here being premature, and that the Officers of the Crown will be under a bias, and their judgment anticipated by the judgment of this Court upon the nature of the Truſt, and that an incorporation cannot be refuſed after a Decree is made by this Court in favour of the Truſt.

I think the application very properly timed, and that it would have been premature to have applied for a Charter before the validity of the Truſt was ſettled in this Court. Suppoſe the reaſons, which have been urged at the Bar, had been laid before the Crown againſt granting a Charter; the anſwer would have been, "We are "not to determine the legality of truſts. To grant or refuſe the "incorporation on that ground is to determine a queſtion *alieni fori*. "That is a queſtion for a contentious juriſdiction to determine be-"tween the parties who are intereſted in it."

A Court of Equity is only competent to ſuch a queſtion, where the parties may have the benefit of an appeal to the ſupreme Court of civil judicature.

Suppoſe the Crown had incorporated the College, and this Court afterwards ſaid, it was a void illegal truſt, and not fit to be executed: the King's Charter had been a nullity, and all the trouble and expence of getting it, idly thrown away. Suppoſe it had been refuſed, upon a ſuppoſition of the truſt being illegal and void; the Crown would have acted upon a falſe ground (if the truſt was not an illegal one), and the parties have been left without any redreſs.

And

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And therefore it is beginning right, to take the opinion of this Court, firſt upon the validity of the deviſe, and the nature of the truſt, which muſt either prevent any application from being made to the Crown at all, in caſe the opinion of the Court is againſt the truſt; or, by a deciſion in favour of the truſt, diſengage the Crown from any perplexity upon that queſtion, and leave it to judge of the propriety of ſuch an incorporation from the ſame reaſons of policy, prudence, and convenience, as would guide and direct it, if the validity of the truſt had never been queſtioned; and as they do in all other caſes, where reaſons, which will not reach the legality of the truſt, may decide againſt it politically, and be ſufficient to determine againſt making the incorporation, or granting a licence of alienation.

As to the Officers of the Crown being biaſſed, and their judgment anticipated by ſuch a decree, I think their judgment will be very properly anticipated as to the legality of the truſt; becauſe it has been ſettled, where it ought to be ſettled, and can only be ſettled,—in this Court.

It will be ſo far from embarraſſing them, that I think it will deliver them from an embarraſſment, by removing a doubt, which might otherwiſe have mixed itſelf in the conſideration of the propriety of ſuch an incorporation.

The opinion of the Court, upon the nature of the truſt, can go no further than a declaration, that, according to the rules adopted by this Court, in compelling the execution of truſts againſt heirs at law, they ſee nothing in the truſt, which ſhould induce them (proceeding in the ordinary courſe of adminiſtering juſtice) to refuſe the execution of it.

But

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But the making of Corporations is part of the King's prerogative, where reaſons of ſtate-policy only are to direct and govern the meaſure. Courts of juſtice, whether legal or equitable, are bound down to rules, and precedents, and reaſons, which have prevailed in ſimilar caſes.

And your Lordſhip, preſiding in this Court, and deciding a queſtion of *meum* and *tuum* between the Univerſity and Lady Downing, may think the reaſons not ſufficient to warrant a refuſal of the execution of the truſt, and yet give them weight in conſidering the propriety of making ſuch an incorporation. And many caſes may be put, where this Court muſt execute the truſt, and yet the Crown would be very rightly adviſed to refuſe incorporating the body which is to be the object of that truſt.

Suppoſe a Truſt created for Birmingham or Sheffield, if incorporated in three years. There is no legal objection to the truſt: but as trade has flouriſhed, and is more likely to flouriſh, whilſt unincorporated than incorporated, the Crown might be very properly adviſed to refuſe the incorporation.

Another difficulty then ariſes; Who is to apply to the Crown for the charter? Not Lady Downing, becauſe it is her intereſt to oppoſe it.

It might be referred to the Maſter to appoint Truſtees for that purpoſe, in the ſame manner as if no Truſtees had even been appointed.

(a) Steward v. Germyn.

And in Duke, Char. Uſes, 79. *(a)* an eſtate was directed to be ſold, without naming by whom, and the Commiſſioners appointed J. S. to ſell the land, and——decreed his ſale to be good; and upon appeal, the Decree was confirmed.

Perhaps

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Perhaps the heirs at law might not be improperly introduced upon this occaſion; and if the heirs at law were to ſucceed the truſtees in every power which they were entitled to under the will, neither the Univerſity, nor Lady DOWNING, nor the Archbiſhops and Maſters, could have any objection to ſeeing the heirs at law of the Donor ſubſtituted in the place of the truſtees. Upon whom does the Truſt ſo naturally devolve, or who ſo proper to guard and protect the Charity, as the blood of the perſon who gave it?

It is my opinion, therefore, to declare the Will well proved, and in caſe a ROYAL CHARTER, with licence to take in mortmain, ſhall be obtained, that the truſts of the will ought to be performed, but as the Truſtees are all dead, the Maſter to appoint five new Truſtees, who are to apply for ſuch Charter of incorporation and licence; and reſerve all further directions till after the Maſter ſhall have made his Report of the event of ſuch application.

The Opinion ſubmitted upon the two firſt queſtions, if it be right, makes it a matter of great indifference to Lady DOWNING, what becomes of

The third Queſtion; whether, ſuppoſing the Truſts illegal and void, or of ſuch a nature as not fit to be carried into execution by a Court of Equity, this Court will apply the eſtate to ſome other charity *ejuſdem generis*, and as near the Teſtator's intention, as the rules of law and equity will permit.

But as this queſtion has been argued at the Bar, I ſhall mention very briefly what occurs upon it.

This Court has long made a diſtinction between ſuperſtitious Uſes, and miſtaken Charitable Uſes.

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By miſtaken, I mean ſuch as are repugnant to that ſound conſtitutional policy, which controuls the intereſt, wills, and wiſhes of individuals, when they claſh with the intereſt and ſafety of the whole community.

Property, deſtined to ſuperſtitious Uſes, is given by act of parliament to the King, to diſpoſe of as he pleaſes; and it falls properly under the cognizance of a Court of Revenue.

But where property is given to miſtaken charitable uſes, this Court diſtinguiſhes between the charity and the uſe; and ſeeing a charitable bequeſt in the intention of the teſtator, they execute the intention, varying the uſe, as the King, who is the Curator of all charities, and the conſtitutional Truſtee for the performance of them, pleaſes to direct and appoint.

If it were *res integra*, much might be ſaid for the heir at law; becauſe in every other caſe, if the teſtator's intention in ſpecie cannot take place, the heir at law takes the eſtate. And as the motive inducing the diſinheriſon in a charitable deviſe, is a paſſion for that particular charity which he has named, if that particular charity cannot take place, *ceſſante cauſâ, ceſſaret effectus.*

The right of the heir at law ſeems to ariſe as naturally in this caſe as in any other; but inſtead of favouring him as in all other caſes, the teſtator is made to diſinherit him for a charity he never thought of; perhaps for a charity repugnant to the teſtator's intention, and which directly oppoſes and encounters the charity he meant to eſtabliſh. But this doctrine is now ſo fully ſettled, that it cannot be departed from; and the reaſon upon which it is founded, ſeems to be this:

The donation was conſidered as proceeding from a general principle of picty in the teſtator. Charity was an expiation of ſin, and

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to be rewarded in another ſtate; and therefore, if political reaſons negatived the particular charity given, this Court thought the merits of the charity ought not to be loſt to the Teſtator, nor to the public, and that they were carrying on his general pious intention; and they proceeded upon a preſumption, that the principle, which produced one charity, would have been equally active in producing another, in caſe the Teſtator had been told the particular charity he meditated could not take place. The Court thought one kind of charity would embalm his memory as well as another, and being equally meritorious, would entitle him to the ſame reward.

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There is a law in the Digeſt, which ſeems to have furniſhed a hint for varying the deſtination of a donation to the public.

Digeſt. xxxiii. Tit. 2. De Uſu & Uſufr. Legatorum.

De Legato Civitati ad certum Uſum. 16.

Modeſtini, Lib. ix. Reſponſorum.

" Legatum civitati relictum eſt, ut ex reditibus quotannis in eâ ci-
" vitate, memoriæ conſervandæ defuncti gratiâ, ſpectaculum cele-
" bretur, quod illic celebrari non licet. Quæro quid de legato
" exiſtimes? Modeſtinus reſpondit: Cum teſtator ſpectaculum edi
" voluerit in civitate, ſed tale, quod ibi celebrari non licet, iniquum
" eſſe, hanc quantitatem, quam in ſpectaculum defunctus deſtina-
" verit, lucro hæredum cedere: Igitur adhibitis hæredibus & pri-
" moribus civitatis, inſpiciendum eſt in quam rem converti debeat
" fideicommiſſum, ut memoria teſtatoris alio & licito genere cele-
" bretur."

Vide etiam Scævolæ reſponſum in § ſequenti.

It is plain they looked at the motive of the gift, the immortalizing the memory of the donor, which was the only future reward a Pagan

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could enjoy. For this law was made 100 years before Chriſtianity was the religion of the Empire. The particular ſpectacle directed was only the means by which that future reward was to be ſecured. Any other ſpectacle would as effectually anſwer that purpoſe. They looked at the end and aim of that benefaction, and ſhaped the means in ſuch a manner, as without any violation of the laws, might ſecure the attainment of it.

The reaſon, which animates the Law, applies as forcibly to a legacy given to a charitable uſe under the Chriſtian diſpenſation.

I do not mean to cite all the Caſes.

The caſe of Da Coſta and De Pas was the laſt great Caſe which I have any account of: that was heard December 6, 1743, at Lincoln's-Inn Hall. It was a bequeſt of the intereſt of £. 1,200. for eſtabliſhing a Jeſuba, or aſſembly for reading the Jewiſh law. It was agreed that it was not a good legacy to the intent for which it was given; but whether it was void generally, or only to this particular intention; or whether it ſhould devolve upon the Crown for its own uſe, or was to be applied to ſome other charity, was reſerved for further argument. And upon 18 May 1754 *(a)*, it was determined, that, as it was a charitable bequeſt in the intention of the Teſtator, though of ſuch a nature as not proper to be eſtabliſhed in this Court, yet it muſt be applied to ſome other charitable uſe, to be fixed by the Crown; and that it was not a ſuperſtitious uſe, given to the Crown for their own *(b)* benefit. And

(a) Ambler, 228.

(b) By the Decree on the original hearing of the Cauſe, the Court declared that the bequeſt was not good in law, and ought not to be decreed or eſtabliſhed by the Court; but reſerved the conſideration whether ſuch £. 1,200. ought to accrue to the reſidue of the perſonal eſtate, or be applied otherwiſe, and how. On the 18th May 1754, the Cauſe came on to be heard upon the ſpecial reſervation in the ſaid Decree, concerning the £. 1,200.; when the Court declared that the ſame ought not to accrue to the reſidue of the

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And therefore, unleſs the Court is of opinion, that the Truſt is totally void to all intents and purpoſes whatſoever, Lady DOWNING could not be entitled to the eſtate. For if the Court is only of opinion, that it is an improper charitable uſe, not fit to be carried into execution by this Court, the conſequences to Lady DOWNING would be materially the ſame. She would be as much excluded by a charity to be fixed by the Crown, as by the charity directed by the Teſtator. And therefore, if the ſecond queſtion was with Lady DOWNING, yet unleſs the third queſtion was with her too, her claim could not be ſupported.

The Maſter of the Rolls having delivered his opinion to the ſame effect; and the Lord Chancellor having agreed with them both:

DECLARED their unanimous Opinion, that the Truſts of the Charity in queſtion ought to be carried into execution, in caſe his Majeſty ſhall be pleaſed to grant his Royal Charter to incorporate the College, and his Royal Licence for ſuch incorporated College to take the deviſed premiſes in mortmain. *(a)*

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the perſonal eſtate, but ought to be applied to ſome other charitable uſe, and that the appointment thereof belonged to the Crown; and recommended it to the Attorney General to apply to the King for a ſign manual to diſpoſe of the ſame. The King, by ſign manual, appointed £. 1,000. part thereof, to the Governors and Guardians of the Foundling Hoſpital, for ſupplying a Preacher in their Chapel, and to inſtruct the children under their care in the Chriſtian religion, and for other incidental expences attending the ſaid Chapel. And on 6th Auguſt following, the Court directed payment of the ſaid ſum of £. 1,000. to Taylor White, the Treaſurer of the Hoſpital. Reg. Lib. A. 1754. fol. 309.

(a) See the ſubſequent Proceedings in this Cauſe in 3 Veſey junior, 714, under the name of Attorney General *v.* Bowyer.

IN CHANCERY.

The Great Seal in Commiſſion.

LORDS COMMISSIONERS,
Lord Chief Juſtice WILLES,
Sir SYDNEY STAFFORD SMYTHE,
Sir JOHN EARDLEY WILMOT.

Lady MANSELL, Widow of Sir EDWARD MANSELL, Deceaſed - - - - - - - - - - - - - - - - - - } PLAINTIFF.

Sir E. VAUGHAN MANSELL, Bart. & Ux. M. LANGDON, and others - - - - - - - - - - - - - - - - } DEFENDANTS.

Hil. 1757.
Lady Manſell againſt Sir E. Vaughan Manſell, and others.

ED. VAUGHAN, Eſquire, by Will dated 30th November 1683, deviſed his eſtates to Sir EDWARD MANSELL and A. MANSELL, deceaſed, remainder to the uſe of EDWARD MANSELL, afterwards Sir EDWARD MANSELL, Baronet, father of the Plaintiff's late huſband, and his heirs for ever.

Sir EDWARD MANSELL, father of the Plaintiff's huſband, by Will 2d September 1717, deviſed his eſtates as follows: viz.—" I give and " deviſe all my lands, tenements, and hereditaments, to my Wife " DOROTHY for ever; and that ſhe ſhall be directed and govern- " ed by JOHN VAUGHAN and MORGAN DAVIES, Eſquires, and " *their heirs*, in the management of her concerns, whom I conſtitute " and appoint my Truſtees of this my Will, to act for her *and my* " *children's intereſt, as hereafter mentioned:* viz. after my ſaid Wife's

" deceaſe, I give, deviſe, and bequeath all my ſaid lands, &c. (ſub- " ject to the legacies hereafter mentioned) to my ſon EDWARD " MANSELL, for and during his natural life; and that he ſhall be " capable, *with the conſent of the ſaid Truſtees*, to ſettle a Jointure " on the woman they agree to in writing he ſhall marry, and from " and after his deceaſe, to his firſt, ſecond, and every other ſon, in " ſtrict ſettlement; remainder to my ſon RAWLEIGH MANSELL for " life, and to his firſt, ſecond, and every other ſon, in ſtrict ſettle- " ment. And my further Will is, that the ſaid RAWLEIGH ſhall have, " during my wife's life, what ſhe pleaſes to allow him, and after her " deceaſe, £. 80. per annum, free of all taxes, for his own life."— He then gives various Legacies, and after making his wife ſole Executrix, he adds, " And for want of heirs male, accordingly as before- " limited and expreſſed, then my Will is, that my ſaid real eſtate, &c. " ſhall be and enure to my four daughters and their heirs for ever, " and for want of ſuch iſſue, to the uſe and behoof of my right heirs " for ever."

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The Teſtator died in March 1720, and his widow DOROTHY, in September 1721.

Their ſon, the late Sir EDWARD MANSELL, was married to his firſt wife ANNE, at the date of his father's Will in 1717; and ſhe died in 1739.

The Truſtees, VAUGHAN and DAVIES, were at that time both dead; VAUGHAN dying in 1722, and DAVIES in 1728. In October 1740, Sir EDWARD MANSELL married the Plaintiff.

The Bill ſtated, that the ſaid Truſtees, VAUGHAN and DAVIES, being both dead, ſo that their conſent became impoſſible by the act of God; and the ſaid Sir EDWARD MANSELL thinking it reaſonable

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to make a proviſion for the Plaintiff, in caſe ſhe ſhould ſurvive him, did, in conſideration of, and previous to the marriage, by Leaſe and Releaſe of the 30th and 31ſt October 1740, convey the eſtate in queſtion to Truſtees, &c. to the uſe of himſelf for life, remainder to the Plaintiff for life for her Jointure. He died 9th May 1754.

The Defendant Sir Ed. Vaughan Mansell, admitted the Will and other proceedings ſtated in the Bill, but ſaid that the Plaintiff's late huſband did at and long before his father's death, lead a very debauched life, and was at that time married to two wives, one of them Louisa Smith, a woman of a very vicious courſe of life, from whom he was ſeparated, and had libelled for a Divorce; the other was Anne, the widow of R. Phillips: and Defendant believed that the manner of life he led, and his imprudence in marriage, and apprehenſions of future miſconduct, were the reaſons of his father's limiting the eſtate to him in ſo ſtrict a manner, and of his annexing ſuch ſtrict conditions to his power of making a Jointure on any future wife he ſhould marry; that though the Truſtees were both dead, the eldeſt ſon and heir of Morgan Davies, the ſurvivor, was alive, and then of the age of forty years, and was never applied to for his conſent; as Sir Edward muſt have been fully convinced that no perſon who had the leaſt regard for him, would have conſented to ſuch marriage; in regard that the Plaintiff, long before her ſaid marriage, was not only a woman of no family or fortune, but of ill fame; and alſo, that Sir Edward Mansell was fraudulently prevailed upon to make ſuch Settlement; inaſmuch as the Plaintiff, or ſome perſon on her behalf, prevailed on him before the ſaid marriage, to execute a Bond to her by the name of S. Baylis, ſpinſter, for £.6000. notwithſtanding no Conſideration was paid.

The

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The Defendant ſubmitted therefore, that ſuch Settlement was not duly made, being without the conſent of the heir of the ſaid MORGAN DAVIES, the ſurvivor of the two Truſtees; that he, being eldeſt ſon of the ſaid RAWLEIGH MANSELL deceaſed, is Tenant in Tail under the Will of the ſaid Sir EDWARD MANSELL the father, on the death of the Plaintiff's huſband without iſſue, and alſo heir general of the family; and that as the Plaintiff's late huſband intermarried with the Plaintiff, without the conſent of the original Truſtees, or the heir of the ſurvivor, he had not any Power to limit the ſaid premiſes in Jointure to the Plaintiff, ſuch previous conſent being, as he was adviſed, a condition precedent to the veſting of the ſaid Power, and therefore, that the Settlement is abſolutely void.

Lord Commiſſioner WILMOT.

There are three Queſtions:

1ſt. What the Power deviſed is, whether a Power to make a Jointure, with conſent of VAUGHAN and DAVIES perſonally, or with their conſent, whilſt they lived, and, after their deaths, with conſent of their Heirs? whether he intended to give the Heirs the ſame check and controul as he gave to VAUGHAN and DAVIES?

2d. If he did, whether this Intention can take place according to the rules of Law?

3d. In caſe the conſent ſtops at VAUGHAN and DAVIES, and does not extend to their Heirs, whether the Power exiſts after their deaths; or in caſe it be determined at Law, whether a Court of Equity can ſet it up again?

The firſt Queſtion is merely a queſtion of Intention, which muſt be collected from the ſituation of the Teſtator and his family at the time

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time he made this Will, and from the words of the Will; for though evidence of intention, *dehors* the Will, is not admitted; yet facts and circumſtances regarding the Teſtator and his family, have been always taken into conſideration to explain and illuſtrate the words of a Will.

Sir EDWARD MANSELL had a wife, two ſons, and four daughters: he was ſeiſed in fee of two eſtates; the MANSELL eſtate, £. 800. a year, rightfully; the VAUGHAN eſtate, £. 650. a year, or thereabouts, wrongfully; but, as he thought, rightfully.

In this ſituation, he makes a Settlement of all his eſtates by his Will. The firſt object of his care was his Wife; he gives the whole to her for life; he makes his Son to depend abſolutely upon her whilſt ſhe lived; ſhe is to maintain RAWLEIGH, and the unmarried Daughters: after her death, he gives £. 1,000. a-piece to the daughters, and £. 80. a year to RAWLEIGH; ſubject to theſe proviſions, he gives the eſtate to his eldeſt ſon for life, who was at that time married very improvidently, and was ſuppoſed to have two wives alive at the ſame time: His father's diſpleaſure was incurred. John Price ſwears his father was very angry on account of both the ſaid marriages: however, his anger did not operate ſo far as to produce any diſinheriſon of him or of his children; they were to inherit his Title, and therefore his Son's children, even by his then Wife, who had come into his Family without his conſent, were to take the eſtate in a courſe of ſucceſſion; but as to the Wife herſelf, he would not give him a Power of ſettling any thing upon her, even with the conſent of his Truſtees, however ſhe might deſerve it by any future behaviour. Then an event ariſes in his mind—the Wife might die, or perhaps a nearer event might be in his eye, which was a Divorce: ſuppoſe that ſhould happen, what muſt he wiſh? If no children at all——that his

Son

Son ſhould marry again, and have children for the continuance of his name and family. If he had children, he might wiſh he ſhould marry again, rather than lead a diſſolute profligate life, and ſtrengthen the ſucceſſion by having more children, provided he made a proper choice. He might wiſh he ſhould rather not marry at all, than marry a common proſtitute, a circumſtance not in his power to prevent; he could not direct his choice, but if he choſe improperly, he could prevent that perſon from having any intereſt in his eſtate; and by excluding his preſent wife from having any chance of a Jointure, he ſhews that the ruling paſſion of his diſpoſition was, that no improper perſon ſhould ever have any thing to do with any part of his eſtate. The Power of making a Jointure would enable him to marry properly and prudently; but if he was to exerciſe that power as he pleaſed, he might exerciſe it improperly and imprudently; from what had happened, he had no great reaſon to repoſe any confidence in him; and therefore, to give him a Power of making a Jointure as he pleaſed, was too great a Power. On the other hand, if he had no Power of making a Jointure at all, no Lady of fortune or family would marry him. He would not truſt him with making a Jointure upon whom he pleaſed, nor abſolutely tie him up from making a Jointure at all. He took the middle way, a Power of making a Jointure with conſent of Truſtees; it is a kind of delegation of his own authority. "If he marry a woman I like, I ſhould be very willing to ſettle a Jointure upon her. If after my death, he marry a woman they approve, he ſhall have the ſame Power. This qualification will give all the good which ſuch a Power can give, and at the ſame time guard againſt all the abuſes of it. There will be no temptation for a profligate woman to entrap my Son, when there is nothing to be got by it. It will be

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a motive for a Lady of merit and fortune to make the alliance, when ſhe ſees a proper proviſion may be made for her. When my Son finds he can make no Jointure, unleſs the woman he propoſes to marry is approved of by the Truſtees, it is the moſt likely method I can take to make him look out for a Lady worthy of their approbation." Under theſe reflections, and in this view and proſpect of the future marriage of his Son, he makes his Will. The Truſtees expreſsly named in the Will, were at that time about ſixty years of age, and the ſon's wife thirty. From that fact, the Counſel on both ſides agree in contending, that the Teſtator did not intend to ſtop with the two Truſtees, becauſe it was between five and ſix to one, if alive when ſuch a marriage happened; but from thoſe premiſes they draw very different concluſions. The Counſel for the Plaintiff ſay, this is an evidence of the Teſtator's intention to make the conſent only a temporary check in the exerciſe of this Power, and when conſent could not be had, that the Power ſhould be abſolute. The Counſel for the Defendants inſiſt, this is a reaſon for a liberal conſtruction of the words of the Will; and that as he intended a check, he muſt have meant an effectual check, a check which was to be co-exiſtent with the Power on which it waited, and that can only be by extending it to the Heirs of the Truſtees. Now ſuppoſe he had been told at that time: "It is five to one but theſe Truſtees, or one of them, die before your Son's wife dies. If that ſhould happen, what do you intend in that event? That your Son ſhould ſettle the whole £. 1,500. a year upon whom he pleaſes; or that he ſhould have no Power of making a Jointure at all? or do you intend to give the Heirs of VAUGHAN and DAVIES the ſame controul over this Power, as you have given VAUGHAN and DAVIES, and that their conſent ſhould be neceſſary to the exerciſe of this Power?" I have no doubt but he would

would have choſen the check upon the power by the Heirs of VAUGHAN and DAVIES, becauſe that is a proviſion which comes the neareſt to his intention in giving the Power at all. It does not anſwer it fully and in every reſpect, becauſe it is placing a confidence in perſons he cannot certainly know; for the perſons who are their heirs apparent at the making of the Will, may be dead, when this Power comes to be executed; but though the individuals are not certainly known, yet the ſtock from whence thoſe individuals muſt come, are known and named; it is a Truſt repoſed in the Heads of thoſe two Families, and it is the credit and general character of Families which often occaſion individuals of ſuch Families to be named as Truſtees, when ſuch individuals have been very young, and before they have given any viſible proof or teſtimony of their own honour and virtue; it was not leaving it abſolutely to chance to determine, there being a well grounded hope and expectation that perſons allied to ſenſe, and honour, and virtue, ſhould inherit thoſe qualities: it is all the ſecurity which can be had, and all the caution which can be taken for the performance of Truſts of duration. That Virtues are hereditary and run in the blood, many inſtances evidence the truth of ſuch an aſſertion: though it is not ſo ſatisfactory as checking the Power with perſons, whoſe judgment, ſagacity, and diſcernment have been experienced by him, yet it falls in more with his intention to check it imperfectly, than not to check it at all. Whether ſuch a Truſt can be repoſed in perſons not certainly known, will be the point to be conſidered under the ſecond queſtion. He certainly intended to give a qualified Power in the firſt inſtance, during the lives of the Truſtees; what reaſon can be aſſigned, why he ſhould give an abſolute Power, or no Power at all, when they were dead? The death

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of the Truſtees could not mature his judgment, or affect the motive which induced him either to give the Power or to check it: to intend a check which in all probability would never take place, was as abſurd, as to give a Power which could in all probability never take place: they were both equally out of his intention; he never ſevered the Power in his own mind from the qualification of it; they both together formed one complete idea in his mind; he muſt have intended that the Power and the qualification ſhould live and die together, or to ſpeak more accurately, that his Son ſhould have this qualified Power as long as he lived.

To ſhew that this was his intention, I will examine whether he could intend to give the Power abſolutely, if the Truſtees died. Whilſt the Truſtees lived, they were not only to determine if any Jointure, but what that Jointure ſhould be; for if they could give or withhold their conſent at pleaſure, they might certainly aſcertain the *quantum* of the Jointure; ſo that, according to the circumſtances of the Son, when his wife died, and of his having ſeveral children, few or many, they were to regulate their judgments in the execution of the confidence repoſed in them. If he had many ſons, and was become a very old man, they might not conſent to his making any Jointure at all upon any woman. If to make a Jointure at all, the family, the fortune, and other circumſtances, were to have regulated the *quantum*. But if the reſtraint was to fly off, and the Power to become abſolute on the death of the Truſtees, ſurely he would have given ſome directions as to the *quantum* of the Jointure, or the Fortune to be brought as an equivalent for it, or that moſt material circumſtance, his having or not having ſons by his firſt Wife. What a vaſt immenſe ſpace there is between not truſting his Son to ſettle a

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ſhilling upon any woman whatſoever, proper or improper, without the conſent of two Truſtees, and leaving him at liberty to ſettle the whole £.1,500. a year upon whom he pleaſed; for take away the check, and he may ſettle the whole, and though the Plaintiff ſhould be evicted, that makes no difference; it is to be conſidered, as if ſhe had the whole of the eſtate.

It is not poſſible to conceive that a man's imagination ſhould ſtep from one extreme to another, without any cauſe whatſoever, to make this alteration in his intention; there is a much leſs diſtance between giving a limited circumſcribed Power, and no Power at all, than giving a limited Power and an abſolute one.

Powers to make Settlements upon ſecond Wives, where there are children by the firſt, are not always inſerted in Settlements, and are often attended with great inconveniences to Families; but there never was ſuch a thing heard of, as to give a Power of ſettling the whole family eſtate, without any reſtraint, upon a ſecond Wife, even though there ſhould be children by the firſt. It is not done where a Son marries with conſent, much leſs where there was ſuch an inſtance of his indiſcretion: could the Teſtator ever intend to leave his Grandſons, or his ſecond Son, or his Sons, who were to inherit the Title, without a ſingle ſhilling, during the life of a woman without the leaſt fortune or merit whatſoever?

But ſuppoſe the queſtion had been put: "You cannot check this Power by the conſent of the heirs of the Truſtees; it is uncertain who they may be; they may be idiots, lunatics, infants, or ſuch a number of heirs as may never conſent; the Law will not endure ſuch a diſpoſition. You muſt either give him the Power abſolutely, or not give it him at all, after the death of the Truſtees. Two events may happen;

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happen; your Son may reform, and be diſpoſed to marry a woman of virtue, family, and fortune. This Power will enable him to make ſuch an alliance. He would probably anſwer, "But if he have "many children by his preſent wife, there is no occaſion for his "marrying again at all: and if he has no children, and he ſhould "marry again, he may chooſe as improperly as he has done al-"ready; whereas he may marry prudently if he has no ſuch Power. "My Grandchildren and ſecond Son cannot be hurt if he has no "ſuch Power; but if he has ſuch a Power, they may be injured ex-"tremely by the abuſe of it." The ruling paſſion of his mind was to guard againſt a profligate woman having any thing to do with his eſtate. He would not ſo much as let the woman he had married have a chance for one inch of his eſtate. In the ſtate of mind he muſt then have been in, the very chance of a ſecond improvident match, and the proſpect of his Grandchildren, or his ſecond Son, being poſtponed for the life of ſuch a woman, muſt have turned the ſcale againſt giving a Power free from controul. Will the words of the Will bear this conſtruction? He gives the whole to his Wife, and then ſays, ſhe ſhall be directed and governed by VAUGHAN and DAVIES, and their Heirs, in the management of her concerns, whom he conſtitutes and appoints Truſtees of his Will, *to act for her and his children's intereſt as hereafter mentioned*; then to his Son for life, and that he ſhall be capable, with conſent of his ſaid Truſtees, to make a Jointure on the woman they agree he ſhall marry; and who were to direct and govern his wife. The Truſtees were VAUGHAN and DAVIES—was there any body elſe? Their Heirs. If the Heirs of VAUGHAN and DAVIES were to direct and govern his wife, they were to be Truſtees. What effect this nomination of Truſtees would

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have as to his Wife, is not the queſtion. He thought gratitude, affection, and a deference to him, would incline her mind to comply with that injunction; and if he was providing for an event of their deaths, and ſubſtituting their Heirs to direct and govern his Wife, who was as old as the Truſtees, *a fortiori* he muſt intend that proviſion to take place in reſpect of his children, who were ſo much younger than the Truſtees and his Wife.

This is the more enlarged and liberal conſtruction of the Power, and moſt for the benefit of the perſon to whom it is given; for if a Power is to be executed with the conſent of a particular perſon, and it cannot be executed after the death of that perſon, as will appear upon the third Queſtion, this is the moſt benign conſtruction of the words of the Will, and we muſt conſtrue it now exactly in the ſame manner as if the Power had been executed with the conſent of the Heirs at law of the Truſtees, and the preſent Defendants had now been contending that the conſent was confined perſonally to the two Truſtees, and, as they were dead, that it could not now be executed at all. View the caſe in that light, and the Plaintiff's right would have been incontrovertible.

It is to be conſidered in the ſame manner as if he had ſaid, "With conſent of VAUGHAN and DAVIES, and their Heirs;" but if he had ſaid ſo, then,

The ſecond Queſtion ariſes; viz. Whether that intention can take place according to the rules of Law?

It is not neceſſary to determine this Queſtion. For, if the Teſtator intended they ſhould conſent, it ſhews he did not intend that the Power ſhould be executable after the death of the Truſtees without conſent,

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conſent, which is the great point of this Queſtion, and in reality decides it. But, for my own part, I do not ſee any Rule of Law which encounters this Intention.

The Objections are; firſt, that it is abſurd to place a confidence or truſt in perſons who are not known to the party who truſts them, becauſe the motive of choice is the judgment and honour of the party truſted, which cannot be where the perſons are unknown.

That Objection goes too far, for it ſtrikes at all Authorities coupled with Intereſts. For, ſuppoſe eſtate to A. and his Heirs, upon Truſt, to convey to ſuch woman as B. ſhall marry with the conſent of his Heirs; there the eſtate will draw the Truſt along with it, and there is as much perſonal confidence put in the one caſe as in the other: nay, there is a greater, for if he ſhould ſell the eſtate for a valuable conſideration to a Purchaſer without notice, the eſtate is loſt. It would be an objection againſt creating any Truſts, which would laſt longer than the lives of the perſons truſted. There is a neceſſity for truſting perſons who cannot be perſonally known, in order to effectuate men's intentions in the exerciſe of that dominion which the Law gives them over their properties. There is nothing abſurd in truſting perſons not known, nothing incongruous or repugnant to the rules of Law. If there was, the uniting an Authority with an Intereſt could not legitimate it, becauſe it does not remove the Objection, which is, that I do not perſonally know whom I truſt.

The Caſe in Moor 61. is directly in point, that a confidence or authority may be committed to perſons who cannot be known to the party. Nothing can be more perſonal than the ſelling an eſtate, and diſpoſing of the money for the good of the Teſtator's ſoul; and the inſtances there put, of a Sale by a perſon to be appointed by his Wife,

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Wife, by the right heirs of J. S. or by the mayor of London, prove the ſame poſition, even in caſe of a naked Authority.

It is then objected, that this is a kind of Judicial Office, a *forum domeſticum*. There is no certain rule that a Judicial Office cannot be granted in fee: that of Sheriff, which in ſome branches is a Judicial Office, may: the great Appellant Juriſdiction of this kingdom is hereditary; if it were improper, it would be much more ſo in the laſt reſort than in the firſt.

Judicial Offices are grantable in Fee; viz. Uſhers and Chamberlains of the Exchequer; Office of Warden of the Fleet, a great Truſt, and yet grantable in Fee. Objected, that there may be no body to execute it till adminiſtration, which may be given to entire ſtrangers, named by the Ordinary, or named by the party. Heirs are certain upon death of Anceſtor, and muſt be of the blood of the perſon in whom it radically and primarily veſted. But it cannot be compared to a Judicial Office: this is a mere ſingle act to be done; to judge of the general character and fortune of the Lady: it does not require great ſkill and ability; one man is as good a judge as another; as to real merit and temper, and diſpoſition, the wiſeſt are generally the worſt judges.

It is ſaid, that a naked Authority will not ſurvive, and therefore will not deſcend; that Peyton and Bury proves the principle. That Caſe does prove, and the Law is ſettled, that a naked Authority will not ſurvive, though there is ſomething very like a naked Authority that will ſurvive, viz. Guardianſhip, 2 Peere Will. 103.—Lord Shaftsbury's Caſe—the ſlendereſt intereſt coupled with it which can be conceived: an action may be brought for the Ward, but it is ſuch an Intereſt as cannot be aſſigned or tranſmitted; and as this

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ſpecies of Authority may ſurvive, though it cannot be tranſmitted, an Authority may be tranſmitted which cannot ſurvive; but where Office or Authority is given to two and the Survivor, then it will ſurvive. This ſhews there is nothing in an Authority incompatible with its ſurviving, but only proves, that if I ſay, I will truſt two, the Law will not ſay, I ſhall truſt one: it is a joint confidence; but if it is limited to Survivor, it is ſaying, I will truſt two as long as they live, and afterwards one of them. So, if a Power is given to A. the Law will not ſay, he ſhall truſt his Heir; but if he ſhould ſay, he will truſt his Heir, there is as much reaſon to give that purpoſe an effect, as to truſt one inſtead of two. The Caſe cited ſhews a man may truſt perſons he does not know; if nothing illegal, the intention ought to take place; it is not giving a ſurviving or deſcendible quality of a naked Authority; but it is a ſpecial deſignation and deſcription of the perſons to whom the Power is given upon the death of the perſons expreſsly named. A perſonal eſtate has no deſcendible quality in it; it cannot be made to deſcend to an Heir at Law; but it may be given to an Heir at Law by a ſpecial deſcription. Deviſe of perſonal eſtate to Heirs of A. good: or to A. and his Heirs during the life of B.: ſo a Power may be deviſed, with conſent of the Heirs of A. It might be ſo given in the firſt inſtance; it may be given ſo eventually; and though given to Heirs of perſons particularly named, yet it is the ſame as if, after their deaths, the Heirs of any other perſon had been named; and though in this Caſe they are named, as if intended to take by deſcent, yet it muſt take effect according to the legal operation; by deſcent, where it can, by ſpecial deſcription, where it cannot, as in the eſtate *per autre vie*. It is then ſaid, as it is clear it cannot ſurvive, what muſt have become of it after the death

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death of one of the Truſtees? It muſt do as in all other caſes where there can be no ſurvivorſhip, and yet are words to ſhew it is not to determine, viz. take place in the perſons ſubſtituted to act after the death of the perſons named; it muſt be conſidered as a Tenancy in Common; or rather, in analogy to that ſpecies of eſtate, the ſame as if the Teſtator had ſaid, with the conſent of VAUGHAN and DAVIES, while they live; when one of them dies, his Heirs ſhall ſtand in his place, and concur with the ſurviving Truſtee in the check; when both dead, the Heirs of both ſhall concur in the check. If he had ſaid, their ſeveral and reſpective Heirs, it would have been clear; and in common parlance, and according to the common apprehenſions of mankind, when an eſtate is given to two men and their Heirs, no man, not illumined with the legal notion of Jointenancy, could ever conceive the eſtate was to go to the Heirs of the Survivor. The Law depends upon particular reaſons, which it is not neceſſary to conſider in this Caſe; and even at Law, where the thing given is ſeveral in its nature, it ſhall operate ſeverally, though the words are joint. A Corady to two men and their Heirs, is a ſeveral grant to each of them; for the perſons be ſeveral, and the Corady is perſonal, Co. L. 190. a.: ſo here the perſons are ſeveral, and the conſent is perſonal: it is equivalent to ſaying, "With conſent of both while they live, but when one "die, that conſent ſhall devolve upon his Heir: the Heir of the dead "Truſtee ſhall conſent, as well as the ſurviving Truſtee: one may "abuſe the Power; I will ſupply the loſs of one by his Heirs, and "the loſs of both, by the Heirs of both."

It is then ſaid, this Power may devolve on Infants, Idiots, or Lunatics, or ſuch a number of female Heirs, as will make their agreement very improbable, and equivalent to a diſability.

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1ſt. This is an objection to Authorities coupled with Intereſts, as well as to mere naked Authorities; the diſability is the ſame, but it is no reaſon againſt the creating ſuch a Power, that by an accident it cannot be exerciſed.

If the party expreſsly named becomes diſabled, it introduces a ſuſpenſion of the Power: as the death of the party would totally take it away, a temporary diſability would ſuſpend it; and how far this Court will act in ſuch a caſe, is not neceſſary now to determine.

But ſuppoſe the conſent was confined to VAUGHAN and DAVIES, then

The third Queſtion ariſes, viz. Whether this Power can be executed, when this conſent cannot be had; that is, whether the Power becomes abſolute, or expires at their death; and if it expires, whether the Court will ſet it up again?

I will conſider this as a mere legal queſtion, uninfluenced by any apparent or declared intention either way. It is ſaid, that the Power veſts upon the Teſtator's death, and that whenever there is a veſting, whatever happens to defeat it afterwards is a condition ſubſequent; and if that becomes impoſſible by the act of God, that the eſtate or intereſt veſted becomes abſolute. Something does veſt upon the Teſtator's death; a Power to be exerciſed *in futuro*, upon a precedent condition or a contingency; the ſame as veſts in deviſee of eſtates upon condition, not the eſtate itſelf, but a right to have the eſtate, when the condition is performed. Where an eſtate veſts and is executed, it gives an immediate right to the rents and profits, which ſhall not be taken away by a condition becoming impoſſible; but all Powers are executory, and veſt no eſtate in any body till they are executed.

The

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The Power itſelf is a mere incorporeal right, and whilſt it remains incapable of being exerciſed, it is to every intent and purpoſe the ſame as if it did not exiſt at all; and wherever a fact is to happen, before it can be exerciſed, that fact muſt be in the nature of a condition precedent; whatever muſt happen before it can be executed, muſt precede it; the time of exerciſing the Power is the only point of time to be conſidered, whether the condition is precedent or ſubſequent. I have no idea of a condition ſubſequent to the execution of a Power. An eſtate, derived under the execution of a Power, may be defeaſible by a condition ſubſequent.

But before a Power ſtarts from its ſtate of inactivity, whilſt it is incapable of being executed, it does not exiſt: when the event happens, and it exiſts, and is executed, there is an end of its exiſtence, and no ſubſequent condition can unexecute the Power, and determine the exiſtence of what does not exiſt. The Truſtees approbation is a condition precedent to the exiſtence of this Power. His appointment without their approbation, is as ineffectual as their approbation without his appointment. They muſt both concur to the animation of this Jointure: he can no more execute this Power after they are dead, than he can whilſt they live and withhold their conſent.

It has been ſaid, that the execution of this Power deveſts nothing. It poſtpones the remainder: It turns a remainder expectant upon one life, into a remainder expectant upon two: It not only removes the chance of the enjoyment a life back, but it ſuſpends the power of acquiring the abſolute dominion of the eſtate by a Recovery.

It has been ſaid, the words, "if living," muſt be added. If they were, they would not vary the caſe; at leaſt they would vary it no more than what is expreſſed; they cannot conſent, if they are not alive. But there

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there are more material words to be added, viz. "That after their "deaths, his Son ſhould have a Power of appointing a Jointure, with-"out the conſent of any body;" that is, the Teſtator has given a Power to be executed in one event, and, becauſe it cannot be executed in the manner he intended, therefore we muſt give him a Power, from conjecture, which we do not know whether he intended or no, and which we muſt preſume he did not intend, as he has not ſaid it. This would not be expounding a Will, but making a Will; it is not like Coryton and Hilliard, where the words were equivalent to, *if ſo long live (a.)*

(a) Coryton and Hilliard, 10th Auguſt 1745, from Sir Eardley's MS. Notes.

Sir William Coryton deviſed all and ſingular his manors and lands unto his Wife Sarah, Sir Edward Littleton, and others, and their Heirs, determinable as hereafter declared, upon the ſeveral Truſts hereinafter mentioned, viz. until his Son John Coryton, Eſquire, attained his age of twenty-ſeven years, and no longer; in Truſt, in the mean time, out of the rents and profits, to diſcharge the legacies and ſums of money mentioned in his Will, and after payment thereof, to lay out the remaining money at intereſt, upon the ſame Truſts as his lands are ſettled; and after the determination of the eſtate limited to them in Uſe or in Truſt as aforeſaid, and the accompliſhment of his Son's age of twenty-ſeven years, to the uſe of the Truſtees and their Heirs, that they ſhould ſtand ſeiſed to the uſe of them and their Heirs, to the uſe of his Son John and his Aſſigns, for the term of ninety-nine years, *ſans* waſte, and from and after the determination of that eſtate, to the uſe of the ſaid Truſtees, during the life of his ſaid Son John, to preſerve, &c.; and from and after the death of his ſaid Son John, then to the uſe of his firſt and other Sons in Tail, with other Remainders over.

John Coryton the Son died, having made his Will, and deviſed all his perſonal eſtate to his Wife, who claimed the ninety-nine years as a term in groſs.

The Queſtion in this Cauſe was, Whether, on the conſtruction of this Will, John Coryton, the Son, took an abſolute eſtate in the term, or whether only for his life?

Lord Chancellor ſaid,

There are two Queſtions; Firſt, Whether theſe are limitations of a Truſt, or of a legal eſtate? Secondly, Whether the term of ninety-nine years is now ſubſiſting as a term in groſs, or is attendant on the inheritance?

As to the firſt Queſtion, Lord Chancellor was of opinion it was a Truſt and not a Uſe, after the arrival of John Coryton to his age of twenty-ſeven years.

As to the ſecond point, he held it determinable on the death of Sir John Coryton.

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Uvedale

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Uvedale and Halfpenny, 2 P. Will. 151. was a plain apparent miſtake. All theſe kind of affirmative Powers, imply a negative; viz. if they are not executed with conſent, they ſhall not be executed at all.

Powers of Revocation are often given in Marriage Settlements, with conſent of Truſtees; but it was never apprehended that when the Truſtees were dead, the Tenant for life might revoke all the uſes of the Settlement. It is in the power of the giver to modify his gift as he pleaſes, and the donee muſt take it as it is given him; and if he cannot have it in that manner, he cannot have it at all.

The qualification of this Power, being a conſent to a Marriage, is looked upon with an unfavourable eye, and rather throws a miſt about this point, which another kind of qualification would not have done; for ſuppoſe it had been to make Leaſes with conſent of A. to ſuch perſons as A. ſhall approve, or if A. comes from Rome, or any other collateral event, it would not have endured a moment's litigation.

It has been ſaid, Powers muſt be literally conſtrued, and the Caſes adduced are very proper to ſupport that poſition; but in all theſe Caſes a Power has clearly exiſted; whereas the queſtion here is, whether there is ſuch a Power or not. Cro. Elizab. 26. Lee *v.* Vincent, is in point—ſtate it.——Eſtate cannot be ſold after the death of A. In 1 Leo. 286. is a caſe of the ſame kind. Lands to be ſold after an Eſtate Tail, with the aſſent of A. who dies, the Power is gone; and yet very improbable A. ſhould ſurvive the Eſtate Tail.

But the true way of conſidering this queſtion is, to take it as a deſcription and deſignation to take. All Powers ariſe out of the old Fee, and, when executed, operate by the Statute of Uſes, and are equivalent to a limitation inſerted in the Deed containing the Power; the party is in by the giver of the Power: the ſame as if deviſed to

Son

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Son for life, remainder to ſuch woman as he ſhall marry with the conſent of A. and B. She muſt bring herſelf within the deſcription, in order to take. Suppoſe a Power to make Jointures upon any of the Daughters of a particular perſon, and that perſon never has any Daughters, or they all die, or upon a Peereſs. The caſe in Dyer, 189. b. Butler and Bray, is in point upon this part of the caſe, and though obſcurely reported, yet the ſubſtance is plain; and in Godbolt, 77, Bonefant v. Sir R. Greinfield, it is cited in this manner: Lord Bray covenanted, that if his Son marry with the conſent of four Lords, whom he eſpecially names, A. B. C. D. that then he would ſtand ſeiſed to the uſe of his Son and his Wife, and of the Heirs of their two bodies begotten; one of the four was attainted and executed; the others conſented he ſhould marry ſuch a one. He married her, yet no eſtate paſſed, becauſe the fourth did not conſent, and it was a joint Truſt. In 1 Leon. 74. Baldwin and Cock, it is cited again, and ſaid to be adjuſted, that upon that Marriage no uſe ſhall accrue.

It has been argued from Intent, and ſaid, that comparing ages of Truſtees with the Wife's age, it was five to one if they ſurvived her; and therefore that he could not intend to give a Power with a reſtraint which would probably defeat it.

The Teſtator was the proper judge of the propriety of ſuch a diſpoſition: he knew the Wife's age, and the ages of the Truſtees: he might not have given his Son any Power at all: he ſaw the improbability of the Power taking place. If he had thought proper to have given the Power without any reſtraint, in caſe the Truſtees died, he would have ſaid ſo.

Suppoſe it had been given with the conſent of one Truſtee who had been younger than the ſon's wife, yet he might have died before her; and the Teſtator muſt be ſuppoſed to have taken that event

into

into his conſideration; and whether it is more or leſs likely that the contingency ſhall happen is not material: he might have given him no Power; he might have given it him upon an event where it was two to one, or a hundred to one, whether that event ſhould happen: "*expreſſio unius eſt excluſio alterius*;" the giving it in one event, is ſaying he ſhall not have it in any other.

It would be moſt abſurd to ſay, he had given it on a contingency, and yet that he ſhould have it, whether the contingency happened or not; the giving it on a contingency, is equivalent to ſaying, he ſhall not have it unleſs the contingency happens.

The other Lords Commiſſioners being of the ſame Opinion;

DECREE, That the Plaintiff's Bill, ſo far as it ſeeks Relief concerning the MANSELL Eſtate, do ſtand diſmiſſed out of this Court without Coſts, and that poſſeſſion of the MANSELL Eſtate be delivered to the Defendant Sir EDWARD VAUGHAN MANSELL; and Order, that the Plaintiff do deliver to the ſaid Defendant, upon oath, all deeds and writings in her cuſtody or power relative to the ſaid MANSELL Eſtate.

IN CHANCERY.

The Great Seal in Commiſſion.

LORDS COMMISSIONERS,
Lord Chief Juſtice WILLES,
Sir SYDNEY STAFFORD SMYTHE,
Sir JOHN EARDLEY WILMOT.

REHEARING:

HENRY TOYE BRIDGEMAN, Eſquire - - - - - - - PLAINTIFF.

GEORGE GREEN and MARY his Wife, THOMAS GREEN, WILLIAM LOCK, and WILLIAM LOCK, Junior - - - } DEFENDANTS.

AND,

GEORGE GREEN - - - - - - - - - - - - - PLAINTIFF.

HENRY TOYE BRIDGEMAN - - - - - - - - - DEFENDANT.

June 1757. Bridgeman againſt Green and others.

THE ſubſtance of the original Bill was, that in 1746, the Plaintiff hired the Defendant GEORGE GREEN, as a Butler; that the Defendant having ſerved him a ſhort time, took advantage of the weakneſs of his underſtanding, and obtained a Bond from him for £. 2,800. conditioned for paying him an Annuity, if his wages were not paid, or if the Plaintiff turned him out of his ſervice; that he received his rents, and never accounted for them; that he introduced the Defendant WILLIAM LOCK to him, and they together got him to execute conveyances of various forms; that Defendant GEORGE GREEN propoſed to him to mortgage his eſtate to EDWARD BRIDGES, Eſquire,

quire, for £. 5,000. which he did, and received the money in Bank notes; but did not keep any of them, being told by WILLIAM LOCK, that he muſt indorſe his name, which he did, and delivered them to GEORGE GREEN, WILLIAM LOCK, and THOMAS GREEN; that the Plaintiff had applied to them for an Account, which they refuſed. The Bill therefore prayed for an Injunction, and for general Relief.

The Defendant GEORGE GREEN, by his Anſwer admitted, that he came into the Plaintiff's ſervice in 1746, and that in ſix months he gave the Defendant a note of hand for £. 300. and afterwards executed the Bond as ſtated in the Bill; that the Plaintiff having no children, conceived a high opinion of him, and told him and others, that he meant to make him his heir, and give him his eſtate; that he propoſed to raiſe £. 4,000. to give to him the Defendant; and that afterwards, conceiving a friendſhip for Mr. LOCK's ſon, he propoſed to raiſe another £. 1,000. for him; admits that he received £. 2,600. for his own uſe, £. 1,000. in truſt for his brother, and that LOCK received another £. 1,000. for his ſon. He admits the reſt of the tranſaction, except that he denies that he uſed any means to gain an undue influence over him, and that he at all times appeared to be a gentleman of good underſtanding, and capable of managing his own affairs, and that he was not impoſed upon or deceived by him.

THOMAS GREEN, by his Anſwer, ſays, that the Plaintiff often expreſſed the great regard he had for his brother. WILLIAM LOCK ſays, by his Anſwer, that he was employed by the Plaintiff, in September 1750, to draw ſome Deeds, which he did, and which were executed by the Plaintiff; and confirms the other part of the account.

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Theſe Cauſes coming on before the Lord Chancellor Hardwicke, he declared that the ſum of £. 5,000. was obtained from the Plaintiff without any Conſideration, and by undue influence and impoſition.

On a Rehearing before the Lords Commiſſioners:

Lord Commiſſioner WILMOT.

There are two Queſtions in this Cauſe:

1ſt. If this money was obtained from the Plaintiff by undue influence and impoſition?

2d. If LOCK ought to be liable to pay any part of the Coſts of the Croſs Bill, to which he is not a Party?

The firſt is a queſtion of fact, depending upon evidence read in the Cauſe, and a more powerful and unerring kind of evidence ariſing from the whole tranſaction taken together, from the particular relation there is between an Attorney and his Client, and the duty that relation laid LOCK under to BRIDGEMAN.

It was truly ſaid at the Bar, that if the Decree proceed upon a principle of taking away that power which the Law gives every man over his own property, it ought to be reverſed: and moſt certainly it ought; for our Laws, very unfortunately for the owners, leave them at liberty to diſſipate their fortunes as they pleaſe, to the ruin of themſelves and their families. The Roman Laws drew a line between liberality and profuſion; they very wiſely for the public, and very kindly for the parties, conſidered immoderate extravagance—"inconſulta largitio"—as a diſtemper of the mind, and treated a "prodigus," as a madman: they ſaid, "expedit rei-publicæ nequis ſua re male utatur." They thought it ſafer for the public, as well as kinder to individuals, to lay by their eſtates, whilſt they were under the tyranny of their paſſions, and reſerve them

for their uſe, when under the direction of their reaſon. But our Laws ſtrike no ſuch boundary; "ſtat pro ratione voluntas," is the Law with us; every man may give a part, or all of his fortune to the moſt worthleſs object in the creation; and this Court never did, nor ever will reſcind or annul donations merely becauſe they are improvident, and ſuch as a wiſe man would not have made, or a man of very nice honour would not have accepted: nor will this Court meaſure the degrees of underſtanding, and ſay, that a weak man, provided he is out of the reach of a Commiſſion, may not give, as well as a wiſe man. But though this Court diſclaims any ſuch Juriſdiction, yet where a gift is immoderate, bears no proportion to the circumſtances of the giver; "ubi modus non adhibetur, ubi non refertur ad facultates," where no reaſon at all appears, or the reaſon given is falſified, and proved to be a fiction, and the giver is a weak man, of a facile eaſy temper, liable to be impoſed upon, this Court will look upon ſuch a gift with a very jealous eye, and very ſtrictly examine the conduct and behaviour of the perſons in whoſe favour it is made: if it ſee that any arts or ſtratagems, or any undue means have been uſed by them to procure ſuch a gift; if it ſee the leaſt ſpeck of Impoſition at the bottom, or that the Donor is in ſuch a ſituation with reſpect to the Donee, as may naturally give him an undue influence over him, if there be the leaſt ſcintilla of fraud; in ſuch a caſe, this Court will and ought to interpoſe; and by the exertion of ſuch a juriſdiction, they are ſo far from infringing the right of alienation, which is the inſeparable incident to property, that it acts upon the principle of ſecuring the full, ample, and uninfluenced enjoyment of it.

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Take

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Take the Caſe on great outlines: A Gentleman, of £. 800. or £. 1,000. a year, with no ready money, and £. 1,000. in debt, mortgages part of his eſtate for £. 5,000. gives £. 2,600. to a man who came into his family five or ſix years before, as a footman, £. 400. to his wife, £. 1,000. to the footman's brother, £. 1,000. to the ſon of the Attorney who procured the money, and was introduced by the footman, beſides 100 guineas procuration, and £. 123. for his Bill. What! give away the fifth part of all he had in the world, without any apparent motive whatſoever? no extraordinary ſervices, no peculiar good offices, no viſible ſpring from whence ſuch a ſtream of bounty could flow. It muſt alarm and raiſe jealouſies and ſuſpicions in every man's mind who hears of it; for though, as Lock told Floyer, every Gentleman may do what he will with his own, yet people never diſpoſe of their own without ſome motive for doing it. I do not ſay the validity of a gift is to depend upon the relevancy or futility of the motive producing it; but ſtill there is ſome motive which impels the will of the Donor in every gift; and in the diſquiſition which the mind makes after the motive of an extraordinary and unuſual gift, if it cannot find a good one, it is apt to ſuggeſt a criminal one, which has been done in the preſent caſe; and if it can find none, I defy any man, who watches the operation of his own mind, from concluding that ſome foul play has been uſed in obtaining it. Here, the criminal motive, it is agreed on both ſides, muſt be laid quite out of the Caſe, becauſe there is not the leaſt tittle of evidence about it; if there had, I ſhould have thought it a very ſtrong circumſtance for the Plaintiff: for this Court proceeding upon principles regarding the ſafety and utility of the Public, would refuſe or give Relief,

lief, not according to the merit or demerit of the party applying, but as was moſt likely, to prevent ſuch a horrid commerce; and if men were not ſuffered to retain the wages of ſin, it would be moſt likely to remove one great temptation to the inferior part of mankind, and to prevent them from ſubmitting to ſuch execrable proſtitution; and I ſhould not think a man a very free agent, when the party to whom he gives, has a halter about his neck; but as that motive muſt be quite expunged out of the conſideration of this Caſe, there is no motive at all ſuggeſted, but that of reconciling the huſband and wife (which is proved to be falſe) and general affection taken up for a Servant. Now affection alone, even the ſtrongeſt, which is natural affection, works no ſuch effects. Parents upon marriage of Children, or for their advancement in the world, or for ſome particular reaſon, will give liberally to their Children: Maſters often provide a ſupport and maintenance for Servants, during their lives; but Parents very ſeldom extend their bounty ſo far as to mortgage their eſtates for a fifth part of what they are worth, and give it a Child wantonly for no reaſon whatſoever, but to make him independent of them; much leſs will affection alone operate in the caſe of a Servant, ſo as to produce ſuch an immoderate and unuſual largeſs from a Maſter; and in all queſtions ariſing upon fraud and impoſition in obtaining bounties from weak men, the propriety of the act done will always fortify it; the ſeeing a cauſe which might naturally give a being to ſuch a bounty, ſpeaks ſtrongly in favour of it; and on the other hand, the impropriety of the act done, and the high improbability that the cauſe aſſigned ſhould produce ſuch an effect, will always bear a ſtrong teſtimony againſt it, and at leaſt force the mind to give a very favourable reception to any evidence of fraud and impoſition in obtaining it;

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it; and therefore in the preſent Caſe, if an annuity of £. 20. £. 30. or £. 40. a year, had been given GREEN for his life, or the ſum of £. 500. or ſome ſuch ſum, had been given him, conſidering the man, his ſituation, his underſtanding, and his circumſtances, there would have been nothing in the act itſelf which had impeached it; but when the gift bears no proportion to the ſituation of the giver, to his rank in life, and to his circumſtances, and no cauſe is ſhewn which, according to the conſtitution of human nature, and the common and ordinary operations of mere love and eſteem, might naturally beget ſuch a bounty, it carries its own death-wound, as Lord Hobart calls it, along with it, and proclaims itſelf upon view, to be the offspring of fraud and impoſition. But it is worſe here; for by the Croſs Bill, the eſteem and regard is ſaid to be founded upon GREEN's having been a means of reconciling Mr. BRIDGEMAN and his wife; whereas he is proved in the Cauſe to have been the means of parting them.

Having ſaid thus much upon the outſide of the tranſaction, as it ſtrikes me upon the firſt view of it, I will now conſider the ſeveral parts of it.

The Decree is, that the £. 5,000. was obtained from the Plaintiff, and divided between GREEN and his wife, and GREEN's brother, and LOCK the father, without any Conſideration, and by undue influence and impoſition on the Plaintiff, and therefore the real queſtion is, was it obtained by undue influence or impoſition, or not? and as to the reſtitution of the money, independently of the conſideration of Coſts, it ſeems to me to be quite immaterial from which of them the undue influence and impoſition came.

There is no pretence that GREEN's brother, or his wife, was party to any impoſition, or had any due or undue influence over the Plaintiff;

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Plaintiff; but does it follow from thence, that they muſt keep the money? No: whoever receives it, muſt take it tainted and infected with the undue influence and impoſition of the perſon procuring the gift; his partitioning and cantoning it out amongſt his relations and friends, will not purify the gift, and protect it againſt the Equity of the perſon impoſed upon. Let the hand receiving it be ever ſo chaſte, yet if it comes through a corrupt polluted channel, the obligation of reſtitution will follow it; and therefore ſuppoſing Lock's conduct quite unexceptionable, though I think I ſhall ſhew it to be extremely criminal, yet if Lock took this money under the undue influence and impoſition of Green, he has no more right to keep it than Green's wife or brother had; and therefore, ſo far as the admittance of the undue influence and impoſition, by not appealing from the Decree, goes, it reaches the whole £. 5,000. and makes no diſtinction between the money received by Lock, and the money received by Green, his wife, and brother.

The Counſel for Lock have felt the weight of this Decree, unappealed from, ſo ſenſibly, that they have frequently endeavoured to engage our attention to keep the Caſes of Lock and Green quite diſtinct, and to deprecate our mixing them together; but that is the very point of the Cauſe, viz. whether the Evidence does not ſhew a combination and a union between them two to plunder the Plaintiff; and moſt certainly Lock is not concluded by Green's not appealing from the Decree. He may ſay, as his Counſel have done at the Bar, that it was a bounty from the Plaintiff to Green, the reſult merely of his own benevolence to him, without any undue influence or impoſition; or if there were any, yet that he ſtands quite detached from Green; that there was no combination between them, that

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he has done no more than a good Father ought to do, viz. received a bounty for his Son, from a man who might have given him all his eſtate if he had pleaſed. Now as to the undue influence and impoſition of GREEN, the ſtrength of the evidence is, that the Plaintiff was a weak man, and eaſy to be impoſed upon, and that GREEN had a very great influence over him. It is in proof, that he brought his Maſter's purſe into the hall, and ſaid he was maſter of that, and ſhould ſoon be maſter of him. Was this an undue influence; and how did he gain this influence over him? If by falſe ſuggeſtions and miſrepreſentations, it was unduly gained; and if unduly gained, it was an undue influence: a more wicked and more deteſtable mode of acquiring influence cannot well be ſuggeſted. In May 1745, Mr. BRIDGEMAN marries a Lady with 7 or £. 8,000. paid down, and £. 22,000. more in her own diſpoſal: they live very fondly and affectionately together, till this footman comes into the family, which was in the end of June 1746, at £. 6. a year wages; he is not contented with getting 3 or £. 400. of his Maſter in 1747; in April 1748, he goes with him to Kidderminſter, and makes him reſolve not to live with his wife any longer; charges her with infidelity and diſloyalty to his bed, with a ſervant, one Stone: when they returned and went to Clifton, he declared his maſter ſhould go away with him, and actually did take him from her; and, leſt he ſhould have ſenſe enough to ſee through the lie, or love enough to forgive it, when he had rouſed his jealouſy, he endeavours to raiſe an averſion; traduces and vilifies her perſon, calls her naſty, ugly, ſtinking, old faſhioned, &c.—diſſuades him from having any perſonal intercourſe with her; adviſed him not to live with her, unleſs ſhe would unſtring her purſe and give him £. 1,500. and then repents of even qualifying his advice.

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advice. In 1749, when Savage was ſent with a letter to the Plaintiff, and ordered to tell him, that if he would turn GREEN away, and come back with him, ſhe would give him £.20,000; this man's aſcendency was ſo great, that he diſſuaded him from it, and ſaid, "Damn her and her fortune together." There are many other inſtances of his aſcendency over him; but if he could prevail upon him to violate his duty to his wife, and to prefer his footman to her and £.20,000. into the bargain, ſurely there is ſomething more than a ſpark of undue influence in it. The relation between them was inverted, and he appears to be quite in a ſtate of vaſſalage to GREEN. What difference is there between gaining a ſum of money from a weak man, by falſe ſuggeſtions; and gaining the affection of the giver by falſe ſuggeſtions, which affection produces the gift? the gift is bottomed upon falſehood in one caſe as well as in the other; and in ſuch caſes as theſe, the influence is exerted, and the impoſition muſt always be carried on, ſecretly and privately: it is almoſt impoſſible ever to adduce Evidence which applies directly to the act itſelf.

The firſt inſtance of meddling with any part of the real eſtate, was about Michaelmas 1749, when GREEN was to be qualified to ſport: that appears to have been a ſham qualification; for though poſſeſſion appears to have been formally given, and it had the appearance of a livery "by twig and turf, and the key," yet the rents were paid exactly as they were before; and when the eſtate was ſold, GREEN was never made a party to the Conveyance, nor ſet up any title to it; and it does not appear from the Evidence, that the Plaintiff did execute any conveyance at all; and according to Edward Whitehead's account of that tranſaction, it was conducted ſo awkwardly, as might very naturally make GREEN think it was high time to call in ſome

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legal aſſiſtance for getting any part of the real eſtate; for Edward Whitehead ſwears that when, ſome weeks after the livery, &c. he was called into the Muſic-room to be a Witneſs, the parchment was ſigned by GREEN; and that ſome time afterwards he was fetched in again by GREEN, and that the Plaintiff brought out the ſame purchaſe Deed, and ſaid he had ſent for him to ſee GREEN's name cut out, which was then done and flung into the fire. This ſtrange execution of the purpoſe aimed at, which was getting £. 100. a year, muſt have alarmed GREEN, and determined him not to venture upon his own or the Plaintiff's judgment; but to have ſomebody employed, whom, as he ſaid to Loveday, he could truſt *to do his buſineſs for him.*

And now LOCK comes upon the ſtage. Who is LOCK? Why, an Attorney, and a Landlord of a Public Houſe at Farringdon, forty miles from BRIDGEMAN. Did he know him, or had he ever experienced his ability or fidelity? No. It does not appear he ever heard of him in his life before. Who introduced him; and how came he to be employed? GREEN introduced him. Loveday proves, out of GREEN's own mouth, the reaſon why the Attornies of the family were not employed, and why LOCK was—becauſe he could not truſt Barow or Jones; that he had found an honeſt Attorney, Mr. LOCK, *to do his buſineſs.* What was it he could not truſt to Barow and Jones? not, the preparing a Conveyance;—they were much more likely to prepare it properly than an Innkeeper:—he could not depend on their concurring and aſſiſting in the completion of ſuch a ſelf-evident piece of impoſition: he knew that they would take care of BRIDGEMAN, who was their Client, and would guard him againſt impoſition, and not do GREEN's *buſineſs*, which was to carry it into

execution. It is ſaid he did not employ Barow or any neighbouring Attornies, becauſe he wiſhed to keep it a ſecret. But if that was a motive, why fall upon a man GREEN knew, and who had been concerned for him? why not an entire ſtranger? If he meant nothing but what was fair, he was the only man in the kingdom who ſhould not have been employed: beſides, if that had been the motive, who was more likely to keep it a ſecret? An Attorney of great honour, worth, and ability, a neighbour concerned for him before; or a man he never heard of in his life, to whoſe honour, abilities, and taciturnity he was an entire ſtranger? a man engaged in a way of life where a ſecret is the leaſt likely to be kept, unleſs his own intereſt engages him to keep it? GREEN's reaſon therefore for calling in LOCK, appears clearly to have been a conviction that Barow and Jones would not do what LOCK would. When LOCK came to BRIDGEMAN, and was informed what he was to do, that he was to convey £. 160. a year to the man who fetched him, in fee: What was his duty to have done? why, to have remonſtrated, or at leaſt, with modeſty and humility, to have inquired into the principles and motives of ſuch a wild immoderate act. A man of nice honour would have ſaid in a moment, "As I am an entire ſtranger to you and your circumſtances, and there is ſomething ſo very extraordinary and uncommon in what you propoſe to do, I will not be concerned in it upon any account whatſoever:" but there is not an Attorney in the kingdom of common honeſty, or who is deſirous of appearing to have common honeſty, who would not have pauſed upon receiving ſuch orders; who would not have thrown an eye of doubt upon the directions, and have talked very explicitly both to the Maſter and Servant about it. He would at leaſt have protracted the execution

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tion of ſuch an extravagant purpoſe; he would have given time for deliberation; if he received no ſatisfaction from them, he would have taken ſome opportunity of inquiring in the neighbourhood, into the character of this Gentleman and his Servant, and what the opinion of the neighbourhood was about them: but inſtead of proceeding in this manner, Lock finiſhes the affair in five days; he never aſks a ſingle queſtion, but only what he ſhould inſert as the Conſideration of the Conveyance; and though it is not quite clear that Lock was at Brinkmarſh on the 15th September, when the Letter was dated, or that he was preſent when it was written, yet it is very probable he was. He ſays, by his anſwer, that he came on or about the 14th, and ſtaid there about two days; but whether there or not, as he had received directions from the Plaintiff himſelf, the Letter could be written for no other purpoſe, but to furniſh him with a piece of evidence to juſtify his own conduct *(a)*. It ſhews that he thought ſuch a tranſaction as this could not paſs unnoticed by mankind, and that no man could believe he ever received ſuch directions, unleſs he could ſhew them in writing; and to me, this Letter is rather an inſtance of his cunning, in gilding the tranſaction and planning a defence for himſelf, than a proof of his innocence in it.

In caſes of Forgery, Inſtructions under the hand of the perſon whoſe Deed or Will is ſuppoſed to be forged, to the ſame effect as

(a) Lock, by his Anſwer, ſtated, that he came to Brinkmarſh on the 14th September, and that after receiving parol Inſtructions for the Conveyance, he deſired the Plaintiff to reduce the Inſtructions to writing, and to mention what ſum he would have inſerted as the Conſideration. He then added (without ſtating when he left Brinkmarſh) that the Plaintiff wrote a Letter, dated the 15th September, and ſent it to the Defendant at Farringdon; and that the Plaintiff thereby directed him to prepare the Conveyance, and to inſert 3,500 l. as the Conſideration.

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the Deed or Will, are very material; but in caſes of undue Influence and Impoſition, they prove nothing; for the ſame power which produces one produces the other; and therefore, inſtead of removing ſuch an imputation, it is rather an additional evidence of it.

The Combination is evidenced very clearly to me from Lock's conduct upon the firſt interview in preparing theſe Deeds; and if it was to be a Gift, why did he diſguiſe it and bring it forth as a Purchaſe, *bonâ fide*, for a valuable conſideration? Here is one great badge of impoſition—"aliud ſimulatum, aliud actum."—Here he was concurring in an impoſition upon mankind in general; here he was lending his aid and name by witneſſing the Receipt to obtrude a Gift upon the world as a Purchaſe. This ſhews he dealt in maſks and diſguiſes. If Creditors attacked him, it was to be a Purchaſe, *bonâ fide*, for a valuable Conſideration; if neceſſary to ſet it up as a Gift, and the Attorney is aſked, "How came you, when you knew it was only a Gift, to give it the air of a Purchaſe?" then the Letter is to be produced, to ſhew that his Client had directed him to do ſo; and therefore, if the Parties had ſtopt here, and the Bill had been brought to ſet aſide theſe Conveyances, I ſhould have thought the falſity of theſe Conveyances a ſtrong evidence of the Impoſition, and that Lock had been a party to it, and was uſed as an inſtrument by Green in completing it; but in leſs than a month, there is a change of intention, and £. 4,000. is to be borrowed by Lock. What had occaſioned this change of intention does not appear; it muſt have been ſuggeſted by ſomebody, that as money has no ear-mark, it is very difficult to purſue it: Lands are viſible and acceſſible; Conveyances are more eaſily ſet aſide, and reſtitution of Lands is eaſy. Whether any advice was taken on theſe Deeds; or upon conſideration,

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tion, Lock might entertain ſome doubt about the validity of the Deeds; or might wiſh to open a new ſcene, in hopes of getting ſome plunder himſelf; whatever was the reaſon, Lock is employed by Bridgeman to get him £.4,000. The Mortgage was ſome time depending; doubts and difficulties ariſe; Deeds are wanted. In the courſe of this negotiation, Bridgeman contracts a great regard for Lock's Son, and will give him £. 1,000. Was this true? It does not appear that he ever ſaw the boy in his life before the £. 1,000. was paid to the father for him. There is not the leaſt tittle of Evidence in the whole courſe of the Cauſe, to verify that part of the Anſwer; and therefore we muſt take it to be all a fiction, ſo that the motives ſuggeſted in ſupport of the Gifts are both falſe; the one is proved ſo, and the other is not proved at all: but if it had been true, would this Court endure, that an Attorney, who is borrowing money for a Client, ſhould, pending the negotiation, receive either for himſelf, or any of his family, ſuch an immoderate and extravagant bounty as this is? If it ſhould, there is an end of the Statutes of Uſury, and of all that care which the Legiſlature has taken to prevent men, who borrow money, from being plundered by exorbitant Procuration.

This Court will not let an Attorney take a Security from his Client, pending a Suit, for a ſhilling; and yet, in many caſes, it is impoſſible for a man to attain his right without ſome ſuch allurement to induce an Attorney to be concerned for him. If he fail in the Suit, he can never be paid, and therefore it ſeems reaſonable he ſhould ſtipulate for ſome certain extraordinary advantage in caſe he ſucceed: but the Court ſays he ſhall have nothing but his fees. The relation between them, and the power which his ſituation gives him over his Client,

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Client, makes it impoſſible to diſtinguiſh between free agency and undue influence and impoſition; and therefore, in ſuch a ſtate, an Attorney ſhall not take at all. Marriage brocage Bonds, Bonds to lewd Women from Heirs apparent upon contingencies—this Court ſees the Parties in a ſituation ſo liable to be unduly influenced and impoſed upon, that it will preſume they were ſo, and admit no proof to the contrary.

The giving money to the Son, and eſpecially as it is not proved he ever ſaw him in his life, evidences the impoſition more ſtrongly than if given to himſelf. The plain reaſon was, to have made himſelf an Evidence in ſupport of the Gift, and to enable him to call upon this Court for their protection of his Son, as an Infant. I conſider it as a Gift to the Father; and nothing appears to have been ever done to declare the Truſt for the Son. But if it was given to the Son, we cannot execute the Truſt repoſed in us for his benefit more faithfully, than by throwing ſuch a poiſonous weed out of his Fortune: and it is very obſervable, that a falſe colour is given even for borrowing this money. Jones ſwears that the Plaintiff told him, in Lock's preſence, that he did not take up the money as wanting it then immediately, but as he was going abroad, and ſhould want money to lodge in his Banker's hands, to anſwer his Drafts; and the Plaintiff was amuſed with thoughts of going abroad. Jeffrys was to inſtruct Green in French and Latin, and did give him two or three Leſſons; and this deluſion was kept on foot till after the Notes were given, and juſt before the Mortgage was executed: for Jeffrys was not diſmiſſed till the 19th April 1751, and the Notes were given the March before, and the Mortgage executed the 21ſt April 1751; and even at the execution of the Mortgage, Stevens ſwears that

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BRIDGEMAN ſaid he intended going abroad, and wanted the money to lodge in his Banker's hands; ſo that LOCK, at the Spring Aſſizes 1751, and at the execution of the Mortgage, when the Plaintiff tells Mr. Jones why he borrowed the money, ſits by, and as far as ſilence goes, abetts what he knew to be falſe, becauſe he had at that time drawn the Notes for the diſpoſing of the whole £. 5,000; and when Floyer aſked LOCK about it, on 4th September 1751, LOCK tells him he knew nothing of it, and that he was not concerned in it. Here is diſguiſe, artifice, falſe colouring, and low, dirty, ſhallow cunning, from one end to the other. But the taking the Notes to LOCK's Son, is a deciſive mark of impoſition. GREEN had given up his Deeds; the Notes were ſubſtituted in their place, and therefore there might be ſome colour for taking them to GREEN and his Brother; but what pretence for taking a Note for £. 1,000. to LOCK's Son? He ought not, eſpecially whilſt the Mortgage was depending, to have endured the very intimation of ſuch a bounty. But to dare to take a Security for it; to draw it with his own hand, and ſuch a Security—a Note for value received, (which was falſe) ſo as at the end of a month, LOCK might lay him in Gaol, whether he had the money or not, (and if theſe Notes had been indorſed, there would have been no Relief againſt them at Law or in Equity) was ſuch an abuſe of that Truſt which ſubſiſts between an Attorney and his Client, as without any other circumſtance of Fraud whatſoever in the Caſe, would have ſatisfied me in decreeing a reſtitution of the money paid upon Notes ſo obtained.

There had been a ſcheme laid for going abroad, or at leaſt a pretence of that kind, and carried on ſo far in earneſt, that Jeffrys was engaged to go with them. They durſt not venture to truſt BRIDGE-

MAN

MAN with the receipt of the £. 5,000. and have no hand over him at all. Theſe Notes were taken to enforce an application of the money, in caſe they had found him diſpoſed to have broken his chains; and I obſerve the money is ready the very month after the Notes were given. Bridgeman againſt Green and others.

Attornies, by being entruſted with their Clients ſecrets, muſt always have a great influence and aſcendancy over them: they are the great money-borrowers now all over the nation. The wants, the preſſures, and the keenneſs of men's paſſions to get money, for the gratification of their vices or their follies, would make them give any thing to expedite or accelerate a Loan. Men are really not free agents under ſuch circumſtances; they are as much, or more, under the influence of their Attorney in negotiating a Loan, as in the proſecution or defence of a Suit; and the reaſon of the Decree in Walmſeley and Booth *(a)*, applies ſtrongly to the preſent Caſe. I have no doubt, nay I know, there are many Attornies who would have died before they would have acted ſuch a part as LOCK has done in this affair. If there are any who forget that they are Miniſters of Juſtice, and not only ſtand by and ſee their Clients robbed by Footmen, but are themſelves acceſſary to the robbery, and divide the plunder; this Decree will inform them they ſhall not do it with impunity. It is their Duty to avert the blow which fraud and impoſition aim at their Clients. This Court has frequently made them anſwerable for groſs laches and negligence in the placing out their Clients money upon ſham or inſufficient ſecurities; but where, inſtead of averting the blow, a man's own Attorney directs and guides the hand that ſtrikes it,—this Court cannot but expreſs the greateſt reſentment and indignation at ſuch a behaviour: and though, in general, Coſts are not given

(a) 2 Atk. 25.

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againſt perſons who are not Parties to the Suit; yet, as Lock was a Party to the original Cauſe, and they were both brought on together, and he had the management of both the Cauſes, and the ſubject matter of both the Cauſes, as to this point, was the ſame; and he was left out of the Croſs Cauſe, only to make him an Evidence; and he has ſo groſsly miſbehaved himſelf in his Profeſſion, and that miſbehaviour has been the occaſion of both the Suits, and of the Coſts expended by Bridgeman, he ought in Juſtice and Equity to pay them *(a)*.

I have thought upon both the Points as fully as I can, and have had no doubts upon them, and conſequently the leſs occaſion to call in the Authority of the Noble Lord who made this Decree. But though I ſhall always examine, with the utmoſt freedom, the opinion of every man ſubmitted to my judgment; yet I muſt own, that if my mind had ſtood in an equal balance, the Authority of the Noble Lord who made the Decree, would have turned the ſcale; and I am ſure every man, who wiſhes well to the Laws, Liberties, and Properties of this Nation, cannot but wiſh that his Opinions may always have the greateſt weight with his Succeſſors in this Place.

The other Lords Commiſſioners being of the ſame opinion:

ORDER, That the ſaid Decree be

Affirmed.

(a) By the original Decree, both the Defendants were directed to pay the Coſts of both Suits.

HOUSE OF LORDS.

Die Martis, 9° Maij 1758.

Opinion on the Writ of Habeas Corpus.

UPON the ſecond Reading of the Bill, intituled, "An Act for giving a more ſpeedy Remedy to the Subject upon the Writ of Habeas Corpus" *(a)*, it is Ordered by the Lords Spiritual and Temporal, in Parliament aſſembled, That the Judges do attend this Houſe, the firſt Thurſday after the approaching Receſs, to deliver their Opinions *ſeriatim*, with their Reaſons, upon the following Queſtions:

1ſt. Whether, in Caſes not within the Act 31 Car. II. Writs of Habeas Corpus ad ſubjiciendum, by the Law as it now ſtands, ought to iſſue of courſe, or upon probable Cauſe verified by Affidavit?

2d. Whether,

(a) Which "Bill" was as follows: "WHEREAS the Writ of Habeas Corpus hath, in all Times, been deemed to be the moſt effectual Security for the Liberty of the Subject, againſt every kind of wrongful Impriſonment or Reſtraint: And whereas any delay in the awarding or returning of ſuch Writ may be attended with the moſt fatal conſequences to the perſon under reſtraint; and, by reaſon of ſuch delay, the Relief intended to be given may come too late for ſuch perſon to be diſcharged from his reſtraint, or to receive any benefit from ſuch Writ; Be it therefore enacted by the King's moſt excellent Majeſty, by and with the advice and conſent of the Lords Spiritual and Temporal, and Commons, in this preſent Parliament aſſembled, and by the authority of the ſame, That the ſeveral Proviſions which, by an Act made in the thirty-firſt year of King Charles the Second, intituled, "An Act for the better ſecuring the Liberty of the Subject, and for prevention of Impriſonment beyond the Seas," are made for the awarding of Writs of Habeas Corpus, in caſes of commitment or detainer for any criminal or ſuppoſed criminal matter, ſhall, in like manner, extend to all caſes where any perſon, not being committed or detained for any criminal or ſuppoſed criminal matter, ſhall be confined or reſtrained of his or her Liberty,

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2d. Whether, in Cafes not within the ſaid Act, ſuch Writs of Habeas Corpus, by the Law as it now ſtands, may iſſue in the Vacation by *Fiat* from a Judge of the Court of King's Bench, returnable before himſelf?

3d. What effect will the ſeveral Proviſions propoſed by this Bill, as to the awarding, returning, and proceeding upon Returns to ſuch Writs of Habeas Corpus, have in practice; and how will the ſame operate to the benefit or prejudice of the Subject?

4th. Whether,

Liberty, under any colour or pretence whatſoever; and that upon oath being made by ſuch perſon ſo confined or reſtrained, or by any other on his or her behalf, of any actual confinement or reſtraint, and that ſuch confinement or reſtraint, to the beſt of the knowledge and belief of the perſon ſo applying, is not by virtue of any commitment or detainer for any criminal or ſuppoſed criminal matter; an Habeas Corpus directed to the perſon or perſons ſo confining or reſtraining the party as aforeſaid, ſhall be awarded and granted in the ſame manner as is directed, and under the ſame penalties as are provided, by the ſaid Act, in the caſe of perſons committed or detained for any criminal or ſuppoſed criminal matter; and that the perſon or perſons before whom the party ſo confined or reſtrained ſhall be brought by virtue of any Habeas Corpus granted in the Vacation time under the authority of this Act, may and ſhall, within three days after the return made, proceed to examine into the facts contained in ſuch return, and into the cauſe of ſuch confinement or reſtraint; and thereupon either diſcharge, or bail, or remand the parties ſo brought, as the caſe ſhall require, and as to juſtice ſhall appertain.

And be it further enacted by the authority aforeſaid, that whenſoever any Writ of Habeas Corpus, granted either in term or vacation time, on the behalf of any party ſo confined or reſtrained without a commitment for any criminal or ſuppoſed criminal matter, ſhall be ſerved upon the perſon ſo confining or reſtraining ſuch party, or ſhall be left at the place where ſuch party ſhall be ſo confined or reſtrained, the perſon ſo confining or reſtraining ſuch party ſhall make Return of ſuch Writ, and bring or cauſe to be brought the body or bodies, according to the command thereof, within the reſpective times limited, and under the proviſions preſcribed by the ſaid Act to Sheriffs and other Officers, in caſe of commitment or detainer for criminal or ſuppoſed criminal matters; and every ſuch perſon neglecting or refuſing ſo to make return of ſuch Writ, or to bring or cauſe to be brought the body or bodies, according to the command thereof, within the times reſpectively limited, and under the proviſions preſcribed by the ſaid Act to Sheriffs and other Officers, ſhall be guilty of a contempt of the Court under the ſeal of which the ſaid Writ of Habeas Corpus ſhall iſſue; and ſhall alſo for the firſt offence, forfeit to the

party

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4th. Whether, at the Common Law, and before the Statute of Habeas Corpus in the 31ſt of King Charles II. any, and which, of the Judges could regularly iſſue a Writ of Habeas Corpus ad ſubjiciendum, in time of Vacation, in all or in what Caſes particularly?

5th. Whether the Judges, at the Common Law and before the ſaid Statute, were bound to iſſue ſuch Writ of Habeas Corpus ad ſubjiciendum, in time of Vacation, upon demand of any perſon under reſtraint; or might they refuſe to award ſuch Writ, if they thought proper?

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party grieved the ſum of three hundred pounds, and for the ſecond offence, the ſum of five hundred pounds.

And be it further enacted by the authority aforeſaid, That the ſeveral penalties inflicted by this Act ſhall be recovered by the party grieved, his or her executors or adminiſtrators, againſt the offender, his or her executors or adminiſtrators, in like manner as the Penalties inflicted by the ſaid Act are to be recovered.

And, to the intent that no perſon may pretend ignorance of the import of any ſuch Writ, be it enacted, That all Writs of Habeas Corpus, awarded or to be returned under the authority of this Act, ſhall be marked by the Court, or perſon reſpectively awarding the ſame, in this manner:

"By an Act paſſed in the thirty-firſt year of the reign of King George the Second."

And ſhall alſo be ſigned by order of the Court, or by the perſon reſpectively awarding the ſame.

And be it further enacted by the authority aforeſaid, That if any action, plaint, ſuit, or information, ſhall be commenced or proſecuted againſt any perſon or perſons for any offence againſt this Act, the ſame ſhall be commenced within twelve calendar months after the time of the offence committed, unleſs the party grieved be then under confinement or reſtraint; and if he or ſhe ſhall be then under confinement or reſtraint, then within the ſpace of twelve calendar months after the deceaſe of the party ſo confined or reſtrained, or his or her delivery from ſuch confinement or reſtraint, which ſhall firſt happen; and ſuch perſon or perſons ſo ſued in any Court whatſoever, ſhall and may plead the general iſſue, not guilty, or that he or ſhe owes nothing; and upon any iſſue joined, may give the ſpecial matter in Evidence: and if the Plaintiff or Proſecutor ſhall become nonſuit, or forbear further proſecution, or ſuffer a diſcontinuance; or if a Verdict paſs againſt him or her, the Defendant ſhall recover his or her Coſts; for which he or ſhe ſhall have the like remedy as in any caſe where Coſts by the Law are given to Defendants."

6th. Whether

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6th. Whether the Judges, at the Common Law and before the ſaid Statute, were bound to make ſuch Writs, ſo iſſued in time of Vacation, returnable *immediaté*; and could they enforce obedience to ſuch Writ iſſued in time of Vacation, if the party ſerved therewith ſhould neglect or refuſe to obey the ſame, and by what means?

7th. Whether, if a Judge, before the ſaid Statute, ſhould have refuſed to grant the ſaid Writ, upon the demand of any perſon under any reſtraint, the ſubject had any remedy at Law, by Action or otherwiſe, againſt the Judge for ſuch refuſal?

8th. Whether, in caſe a Writ of Habeas Corpus ad Subjiciendum at the Common Law be directed to any perſon returnable *immediaté*, ſuch perſon may not ſtand out an *Alias & Pluries* Habeas Corpus, before due obedience thereto can be regularly enforced by the courſe of the Common Law?

9th. Whether the ſaid Statute of the 31ſt of King Charles II. and the ſeveral proviſions therein made, for the immediate awarding and returning the Writ of Habeas Corpus, extend to the Caſe of any man compelled againſt his will in time of peace, either into the land or ſea ſervice, without any colour of legal authority; or to any Caſes of Impriſonment, Detainer or Reſtraint whatſoever, except Caſes of Commitment for criminal or ſuppoſed criminal matters?

10th. Whether in all Caſes whatſoever, the Judges are ſo bound by the Facts ſet forth in the Return to the Writ of Habeas Corpus, that they cannot diſcharge the perſon brought up before them, although it ſhould appear moſt manifeſtly to the Judges, by the cleareſt and moſt undoubted proof, that ſuch Return is falſe in fact, and that the perſon ſo brought up is reſtrained of his liberty, by the moſt unwarrantable means, and in direct violation of Law and Juſtice?

ANSWER

Opinion on the Writ of Habeas Corpus.

ANSWER of Mr. Juſtice WILMOT *(a)* to the Queſtions propoſed to the Judges by the Houſe of Lords, on the ſecond Reading of the Bill, intituled, "An Act for giving a more "ſpeedy Remedy to the Subject, upon the Writ of Habeas "Corpus."

1ſt. Queſtion. "Whether in Caſes, not within the Act 31 Car. II. Writs of Habeas Corpus ad ſubjiciendum, by the Law as it now ſtands, ought to iſſue of courſe, or upon probable cauſe verified by Affidavit?"

Anſwer.

(a) The following was found among Sir Eardley Wilmot's Papers, endorſed by him, "State of the Caſe on the Preſs Act. April 1758."

"A little before Hilary Term twelvemonth, ſome applications having been made to Mr. Juſtice Foſter by perſons in the Savoy, raiſed under the annual Act then in force, viz. 29 Geo. II. c. 4, *for the ſpeedy and effectually recruiting of His Majeſty's Land Forces and Marines*, he iſſued Writs of Habeas Corpus, upon which the men were brought up, and let go by acquieſcence or conſent, without any Return ever being made: but conceiving it to be a matter of doubt and conſequence how to proceed in ſuch Caſes, he deſired the aſſiſtance of all the other Judges of the Court of King's Bench, to conſider the ſaid Act and what ought to be done.

All the Judges of the Court accordingly met, and the great object of their deliberation was how they might relieve with expedition and effect, in caſe the great power given by the Act was abuſed, without defeating the end of the Act and the view of the Legiſlature where the power was not abuſed.

They conſidered the matter together and ſeparately; they talked with ſome of the moſt eminent Counſel, and it has ſince been ſifted to the bottom. The more it is examined, the more it will be found that what the Court did, was not only the beſt, but the ſole remedy that could be deviſed to relieve the ſubject under immediate oppreſſion from an abuſe of the great power given by that Act, until the Parliament ſhould expreſsly declare their pleaſure in the new Bill for the next year, which, from the ordinary courſe of buſineſs, was expected to paſs in about ſix weeks or two months. To ſhew this, it may be proper,

1ſt. To conſider the nature of the Act.

2d. How men, wronged by the Commiſſioners in the firſt inſtance, might afterwards be ſpeedily and effectually relieved.

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Anſwer. I am of Opinion, that in Caſes not within the Act of the 31 Car. II. Writs of Habeas Corpus ad ſubjiciendum, by the Law as it now ſtands, ought not to iſſue of courſe, but upon probable cauſe verified by Affidavit.

A Writ which iſſues upon a probable Cauſe, verified by Affidavit, is as much a Writ of Right, as a Writ which iſſues of courſe.

There

1ſt.—The Act is founded in the violation of private liberty; and the cauſe alledged for ſuch violation, is the want of a ſpeedy and effectual Recruit.

There cannot be a ſpeedy and effectual Recruit, unleſs the law receives a ſpeedy and immediate execution; therefore the Parliament entruſted Commiſſioners, named by the Act, to execute the powers therein mentioned.

The power given to the Commiſſioners, is to change the condition of men, under certain deſcriptions, into the condition of Soldiers, againſt their will.

The Act requires ſeveral circumſtances to be obſerved before the condition of the Recruit is to be completely changed: but when thoſe circumſtances are obſerved, the Act declares him a Soldier to all intents and purpoſes whatſoever.

The cuſtody or impriſonment in any ſecure place, whether private houſe or priſon authorized by the Act, is temporary, caſual, and a mere conſequence of the man's condition being changed into that of a Soldier. It is only a detention, to ſecure him till he can join the Corps; and gives him no other right to controvert his being a Soldier, than he would be entitled to when he has joined the Corps.

It ſeems from the words and meaning of the Act, that where all the circumſtances have been obſerved, the perſons under whoſe care or authority the Recruit happens to be delivered, are authorized to treat him as a Soldier, to all intents and purpoſes, without being obliged to prove him within the deſcription.

1ſt. From the words:—

Every Clauſe is ſtudiouſly penned, to avoid the poſſibility of a ſuppoſition that the Recruit's being within the deſcription was neceſſary to be proved by every perſon to whom he was delivered, and that the change of his condition was for ever to depend upon proving that he was within ſuch deſcription.

The Pariſh Officers are directed "to bring before the Commiſſioners all ſuch Perſons "as they can find, who are or ſhall appear to them to be within the deſcription of "the Act."

And the Commiſſioners are ſtrictly to examine all ſuch perſons as ſhall be ſo brought before them; and if, upon examination, they ſhall find that ſuch perſons ſhall come

Opinion on the Writ of Habeas Corpus.

There are many other Writs, beſides the Writ of Habeas Corpus, which fall exactly under the ſame circumſtances: Writs of Mandamus, Prohibition, 1 Syd. 65. Sir R. Raymond, 4. Supplicavit, Ne exeat regnum, the Writ of Homine replegiando;—are all Writs of Right; but a proper Caſe muſt be laid before the Court by Affidavit, before the parties, praying ſuch Writs, may be entitled to them. They are the birthright of the people, ſubject to ſuch Proviſions as the

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within the deſcriptions therein mentioned; and the Commiſſioners, and the Officer who ſhall be appointed to receive the Recruits, ſhall judge them to be ſuch as ſhall be thereby intended to be entertained as ſoldiers in His Majeſty's ſervice, then the Commiſſioners are to cauſe ſuch perſons to be delivered over to the perſon appointed to receive them.

The Clauſe enabling the Pariſh Officers, after the ſecond meeting of the Commiſſioners, to take up and detain, without any warrant, ſuch perſons as they ſhould find, or ſhould appear to them to be within the deſcription of the Act, directs the lifting and delivering of them over at the next meeting, if judged within the deſcription of the Act.

The Clauſe relating to the age, ſize, religion, and bodily condition of the Recruits, refers to what ſhall appear in the opinion of the Commiſſioners and Officer appointed to receive them.

The Clauſe relating to the Voters, is conceived in ſuch terms as ſhews the validity of the lifting was not to depend upon the right to vote; but upon the Recruits making it appear to the ſatisfaction of the Commiſſioners then preſent, that he had a right to vote.

After reading the Articles of War, the Act ſays, "he ſhall be deemed a Soldier to all "intents and purpoſes, and ſhall be ſubject to the diſcipline of War, and in caſe of "deſertion, ſhall be proceeded againſt as a Deſerter."

The Act directs many Entries to be made; but directs no Entry of the examination or grounds upon which the Commiſſioners find him to be within the deſcription of the Act.

2dly. From the intention of the Act.

The cauſe of the Act was a ſpeedy and effectual Recruit; but after all the trouble and expence the Public has been at, they would ſcarce have the benefit of a ſingle man againſt his will, if the perſons to whom he is delivered, were obliged to prove him within the deſcription: they are ſtrangers to the proof upon which the Commiſſioners proceeded; and if they knew it, they could not avail themſelves of the ſame kind of proof, which the Act authorizes the Commiſſioners to receive; for they are warranted by the Act to proceed upon the examination of the perſons themſelves, and to judge from what they

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the Law has eſtabliſhed for granting them. Thoſe Proviſions are not a check upon Juſtice, but a wiſe and provident direction of it.

The very learned and able men who framed the 31 Car. II. could not avoid taking theſe Writs of Habeas Corpus for private cuſtody, into their conſideration. Three or four years before that Act paſſed, there

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they do or do not ſay; but a perſon cannot be examined againſt himſelf in any legal proceeding.

No Officer could inquire into the qualifications of Recruits brought from all Parts of the Kingdom. In what condition muſt they be, if they could not juſtify treating or puniſhing the Recruit as a Soldier, without proving he was within the deſcription?

Upon the peruſal of the Preſſing Acts which paſſed in Queen Anne's reign, many obſervations occur:

The 5th of Queen Anne gives a power of Review to the Commiſſioners, at any time, which was not in the former Acts.

The 7th of Queen Anne omits the power of Review; and the proviſo as to Voters is varied, and deſcribes ſuch perſons as ſhall make it appear that they have a vote.

The 10th of Queen Anne is the ſame as the 7th; but reſtores the Clauſe of Review, limiting it to ſix weeks.

The Clauſe of Review was omitted in the 29th George II. and in all the Acts made in this King's reign, before the 29th George II.

The execution of the ſpecial powers given by this Act, for the purpoſes therein mentioned, is like no other Caſe whatſoever. It is not like a Conviction: it is not in writing: it is not by way of puniſhment for an offence. There is no other evidence required than what the man ſays, or does not ſay, upon his examination. If it was to be compared to an Order, then the evidence need not be ſet forth; and there never was an inſtance, upon any of thoſe Acts, of an application for a Certiorari.

This being the nature and intent of the Act;

2d.—The ſecond queſtion is, What Relief a man, who complained that he was wrongfully preſſed by the Commiſſioners, could have by Writ of Habeas Corpus?

When he was at liberty, with the Regiment to which he was delivered, he could have no Habeas Corpus. If he happens to be ſecured in a private houſe, or public priſon, or other ſafe place, the accidental cuſtody gives a pretext to apply for a Habeas Corpus to be ſet at large from that reſtraint.

The Officer or Keeper muſt in his Return, either aver, not only that all the circumſtances required by the Act were obſerved, but that the man was within the deſcription; or elſe, that all the circumſtances were obſerved, and rely upon them as a ſufficient Cauſe and Juſtification, without averring the man to be within the deſcription.

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there had been two very great Caſes, extremely agitated in Weſtminſter Hall, upon Writs of Habeas Corpus for private cuſtody, viz. the Caſes of Lord Leigh, 2 Lev. 128. and Sir Robert Viner, Lord Mayor of London. 3 Keb. 434. 447. 470. 504. 2 Lev. 128. Freem. 389. But they wiſely drew the line between civil conſtitutional Liberty,

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The firſt form of Return could only be made upon the credit of what the Commiſſioners had done, and a preſumption that they had done right.

It is impoſſible for the Officer or Gaoler to proceed upon any other ground; and in execution of the truſt repoſed in him, he ought to give credit to their judgment, and proceed upon that foundation.

In this caſe, the only remedy of the Recruit would be an action for a falſe Return; and no Jury would give more than trifling damages againſt an Officer acting "bonâ fide," and making a Return in ſupport of the truſt which was repoſed in him, the truth of which he could no otherwiſe come to the knowledge of.

Suppoſe the Return made in the other form, the obſervations before mentioned tend to ſhew that it would be ſufficient. In that caſe, no man who admitted all the circumſtances in the Act to have been obſerved, could be entitled to Relief by Habeas Corpus; becauſe upon his own ſhewing there appeared ſufficient cauſe.

In this form the King's Counſel had prepared and ſettled the draft of a Return: ſuppoſe that form not ſufficient; the other muſt have been followed of courſe, as the only one poſſible to be made by the Officer or Gaoler.

But to go farther; ſuppoſe the man ſet at large by virtue of the Habeas Corpus, from the cuſtody of his temporary Keeper for want of Cauſe, or ſufficient Cauſe, ſhewn by the Officer or Gaoler, or upon any other reaſon; he would be in no better condition than if he had never been ſecured at all, and would be liable to be taken up, proſecuted, and ſhot for Deſertion.

The end of the Habeas Corpus is only to ſet him looſe from the Cuſtody, not to determine whether he is a Soldier. The merits of that Queſtion could not be determined in proceeding upon a Writ of Habeas Corpus againſt the Gaoler or temporary Keeper. The Gaoler's acquieſcence to let men go, by making no defence to a Writ of Habeas Corpus, could no more releaſe them from being Soldiers, than his voluntarily giving them leave to go.

In this light, a diſcharge by Habeas Corpus, for want of defence by the Keeper, might be a cruel ſnare to poor and ignorant men: no effectual Relief can be given, but in ſome way which may, as between proper parties, decide the Queſtion whether the man's condition was changed into that of a Soldier. If ſuch a way cannot be deviſed, a Recruit ſo raiſed by the Commiſſioners, muſt be abſolutely without remedy.

In other Caſes, if a man be treated as a Soldier, who is not duly liſted or ſubject to military

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berty, as oppoſed to the power of the Crown, and Liberty as oppoſed to the violence and power of private perſons. They thought this power of judging might be abuſed in favour of the Crown, but they ſaw no danger of an abuſe of it as between one ſubject and another; and therefore they applied the remedy to the evil they had ſeen

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litary diſcipline, he has his Action; nay, the Officer who ſo treats him, may, according to the nature of the Caſe, be criminally liable. But where a man is raiſed under the Act by the Commiſſioners, though wrongfully, yet, the circumſtances of the Act being obſerved, it is a ſufficient juſtification for treating him as a Soldier. The Officer is a ſtranger to the grounds upon which the Commiſſioners proceeded.

Diligent inquiry has been made into the Practice under the former annual Acts of the like kind, and no Caſes have been diſcovered of more than two or three inſtances, from the 2d of Queen Anne to the year 1746, of applications for Writs of Habeas Corpus, by men preſſed under the authority given by any of the Acts during that period.

Only one Return has been found, the Queen and Chamberlayne; and there, upon the face of the Return, the Court ſent the man back without any other Inquiry.

In the year 1746, in the Caſe of King and White, the Lieutenant of the Tower made a Return in the ſame form.

It was impoſſible to ſay the Return was not ſufficient. The Court could not admit Affidavits to contradict the Return; for though in the caſe of a Wife, where the cauſe is totally immaterial; or of a Lunatic, where no legal cuſtody under a Commiſſion is returned, Affidavits may have been let in for collateral purpoſes; yet the truth of a Return, ſetting forth the execution of a ſpecial Authority, Juriſdiction, or Power, cannot be contradicted by Affidavits. It is contrary to all the principles and Authorities of Law; and in the year 1746 there never had exiſted an inſtance.

Had the Court then made a Precedent to contradict the truth of the facts contained in a Return by Affidavits, it could only have been juſtified by the end; but it would have been dangerous, as a deviation from a general rule of Law, and applicable to other Caſes.

The Court took another way: upon reading Affidavits, they made a Rule upon the Commiſſioners to ſhew Cauſe; and for want of Cauſe being ſhewn, diſcharged the man. After a ſufficient Return to the Habeas Corpus, the uſe of the Writ was at an end. No Relief could be given by it. The Relief was given in conſequence of the Rule, and by virtue of the Rule only.

We were glad to follow and improve the plan of this Precedent, by directing Notice likewiſe to be given to the Officers of the Crown, that Mr. Attorney General might be heard in behalf of His Majeſty. The King, in behalf of the public, is alone concerned in the Queſtion, whether the Recruit's condition be changed into that of a Soldier.

If

ſeen and experienced, and left the Law as they found it in reſpect of private perſons.

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There is no ſuch thing in the Law, as Writs of Grace and Favour iſſuing from the Judges: they are all Writs of Right; but they are not all Writs of courſe.

Writs

If that Queſtion were determined in any method where the King was really, not nominally, a Party, and by his Officers ſubſtantially heard or conſenting; we thought the man might be diſcharged from the condition of a Soldier, and ſet at liberty.

An intimation was given to the Practiſers, and alſo in Court, of the Judges Conference.

In the firſt Caſe, the then Attorney General being ill, Mr. Solicitor General came into Court and declared on behalf of the Crown, that there was no objection to diſcharging ſuch men as ſhould appear to the Court to have been unjuſtly preſſed.

No perſon ever applied afterwards for a Habeas Corpus, who, upon being aſked which he meant, did not change his application into a Motion for the Rule.

No Counſel deſired to argue the Queſtion, whether they ought not to have a Habeas Corpus inſtead of the Rule; if they had, they would certainly have been heard; had it been inſiſted upon, for the more ſolemn determination of the Queſtion, a Habeas Corpus would have been granted; but it would have been cruel to the particular perſon not to have given Notice of the reſult of the Conſultation among the Judges, or to have put a poor man to the delay and expence of litigating a point, contrary to the opinion the Court had once conceived, when he had another and eaſy remedy.

The Conſent given on the part of the Crown was never retracted; the moſt eminent Counſel who practiſe in the Court of King's Bench, have publicly averred, that the Court in fact never refuſed a Writ of Habeas Corpus to any preſſed man in cuſtody; and no man, who pretended to know any thing of the matter, has from his own knowledge ſaid the contrary. The Legiſlature, by the Bill now in force, made alterations tending to explain the Law in the ſame way; for they have directed that the Commiſſioners ſhould levy ſuch able bodied men, who could not, upon examination, prove themſelves not to be within the deſcription of the Act.

They have given a power of Review to the Commiſſioners themſelves within ten days; and if the Recruit is diſcharged, the levy money is directed to be returned; and they have likewiſe preſcribed a particular form of Entries to be made in columns; but no Entry is required of the proof or examination upon which the Recruit is raiſed.

By this Act the Legiſlature gave more than a ſilent ſanction to what the Court has done, and ſtrengthened the reaſons for purſuing it. There is now depending a Caſe upon the Rule, in which no Habeas Corpus could poſſibly have iſſued."

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Writs of courſe, are thoſe Writs which lie between party and party, for the commencement of Civil Suits: and if they are ſued without a good foundation, the Common Law puniſhes the Plaintiff for ſuing out the Writ vexatiouſly, by amercing him "pro falſo clamore." And by the Statute Law, he is to pay the Coſts of the Suit.

But the Writ of Habeas Corpus is not the commencement of a Civil Suit, where the party proceeds at the peril of Coſts, if his complaint is a groundleſs one: it is a remedial mandatory Writ, by which the King's ſupreme Court of Juſtice, and the Judges of that Court, at the inſtance of a ſubject aggrieved, commands the production of that ſubject, and inquires after the Cauſe of his Impriſonment; and it is a Writ of ſuch a ſovereign and tranſcendent authority, that no privilege of perſon or place can ſtand againſt it. It runs, at the Common Law, to all Dominions held of the Crown. It is accommodated to all perſons and places. 2 Cro. 543. Palmer, 54. And, as all theſe remedial mandatory Writs were, originally, rather the Suits of the King than of the Subject, the King's Courts of Juſtice would not ſuffer them to iſſue upon a mere ſuggeſtion; but upon ſome proof of a wrong and injury done to a Subject.

Writs of Habeas Corpus, upon impriſonment for criminal matters, were never Writs of courſe: they always iſſued upon a Motion, grafted on a copy of the Commitment; and Caſes may be put in which they ought not to be granted. 1 Lev. 1. Comber. 74. Habeas Corpus was denied to one committed to Bridewell for lewdneſs. 3 Bul. 27. 2 Mod. 306. If malefactors, under ſentence of death in all the Gaols in the Kingdom, could have theſe Writs of courſe, the ſentence of the Law might be ſuſpended, and perhaps totally eluded by them.

The

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The 31 Car. II. makes no alteration in the Practice of the Courts in granting them: they are ſtill moved for, in Term time, upon the ſame foundation as they were before: and when a ſingle Judge in Vacation grants them under the 31 Car. II. in criminal Caſes, a copy of the Commitment, or an Affidavit of the refuſal of it, muſt be laid before him. He muſt judge, even in that caſe, whether Treaſon or Felony is ſpecially expreſſed in the Warrant of Commitment: and there have been a great number of Caſes where a doubt has ariſen on the frame and wording of the Warrant; ſo that even upon the Act, the probable cauſe of Bailing is really diſcloſed to the Judge, unleſs the copy of the Commitment is refuſed, and then the Law will preſume every thing againſt it; and in Caſes out of the Act, which take in all kinds of confinement and reſtraint, not for criminal, or ſuppoſed criminal, matter, and to which this Queſtion relates, it has been the uniform uninterrupted Practice, both of the Court of King's Bench, and of the Judges of that Court, that the foundation, upon which the Writ is prayed, ſhould be laid before the Court or Judge who awards it.

The reaſons of guarding the Writ in this manner, I take to be theſe: There are many kinds of private Reſtraint that are lawful. There was a much greater number formerly. The Reformation opened the doors of Religious Priſons; and the abolition of Military Tenures unfettered an unhappy claſs of men, called Villeins, who lived in a ſtate of captivity under their maſters.

There are many kinds of Reſtraint that exiſt at this day; ſome in the nature of Puniſhments. In domeſtic government, which takes in the Caſe of Huſbands, Fathers, Guardians, and Maſters, the Law

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authorizes Reſtraints, in order to enforce a performance of thoſe natural, moral, and civil duties, which Wives, Children, Wards, and Apprentices, owe to their Superiors, in their ſeveral relative capacities. Theſe domeſtic Governments could not ſubſiſt without ſuch authorities; and therefore all States have endeavoured moſt anxiouſly, ſome in a greater degree, and others in a leſs degree, to preſerve the greateſt reverence for them.

The wiſdom of our Anceſtors would not ſuffer this kind of Authorities to be broken in upon wantonly, upon mere ſuggeſtion, and without ſeeing ſome reaſon for an interpoſition; becauſe they ſaw it would have encouraged diſobedience and rebellion in private families; and, at all events, muſt have abated that awe and reſpect which act ſo materially in the ſupport of thoſe Authorities. They may be abuſed: if they are, the Law ſays, let it be ſhewn, and the party ſhall have Relief; but if he cannot ſhew they are abuſed, he is entitled to none. The legal preſumption is certainly in favour of theſe Authorities; the Law will not preſume they are unduly or irregularly executed.

But if theſe Writs were to have iſſued without any Caſe made, they muſt have iſſued indiſcriminately, in the Caſes of lawful Reſtraints, as well as unlawful ones; which would have been levelling all diſtinction between them, and have been ſubjecting the authority of Fathers, Huſbands, Guardians, and Maſters, to be canvaſſed and queſtioned in the ſame manner, and upon the ſame ſuggeſtions, as the extravagant outrages of perſons acting without any authority at all.

It would have been proceeding upon an inverſion of the legal preſumption, and would thereby have deſtroyed all that order, diſci-

pline, and ſubordination in private Families, which lead men into a habit of obedience, and diſpoſe them early to obey the Laws of their country.

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When a Judge is called upon for a Habeas Corpus, in order to bail a man for a bailable Offence, the injuſtice of the impriſonment is obvious and ſelf-evident: for Impriſonment before Trial, being only to ſecure his being amenable to juſtice; if that Security can be obtained by Bail, in bailable offences, it is unjuſt that he ſhould be kept in Priſon. The Authority which committed him ought to have bailed him.

The Authorities I have mentioned are equally legal, and therefore within the ſpirit and reaſon of the Habeas Corpus Act itſelf. The injuſtice of the Impriſonment ought to appear in the firſt inſtance, before the Party has a right to demand the remedy.

The Law laid this check, to prevent that ſcene of diſorder and confuſion which muſt ariſe, if Wives, Children, Wards, and Apprentices, or any other perſon in their name, and on their behalf, were to be at liberty, without any foundation or cauſe ſhewn, to force a production of them in Weſtminſter Hall, or before a Judge, wherever he ſhould happen to be, whenever they pleaſed, and as often as they pleaſed, at a riſk of having them reſcued out of their hands, "in tranſitu," and without a poſſibility of a ſatisfaction from any body.

There are many other lawful Reſtraints beſides thoſe ariſing under the Authorities I have mentioned:—All perſons who are in cuſtody upon Civil Proceſs, or under ſpecial Authorities, created by Act of Parliament, proceeding "civiliter," and not "criminaliter," againſt the perſons who are the objects of them:—Perſons who are bailed, Paupers in Hoſpitals or Workhouſes, Madmen under Commiſſions

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of Lunacy, or confined by Pariſh Officers, under the Vagrant Act of 17 Geo. II. are all under a lawful confinement.

If all theſe perſons were to have had theſe Writs of Habeas Corpus of courſe, without ſhewing any cauſe or foundation for granting them, it would have been ſuffering this great Remedial Mandatory Writ to have been uſed as an inſtrument of vexation and oppreſſion; it would have become a weapon in the hands of madmen, and of diſſolute, profligate and licentious people, to harraſs and diſturb perſons acting under the powers which the Law had given them.—One moſt frightful inſtance occurs: the Caſe of a crew performing Quarantine.—If this Writ were to iſſue of courſe, it might bring back peſtilence and death along with it.

The check upon the Writ, by requiring a probable cauſe to be ſhewn before it iſſues, is only ſaying, "ſhew you want redreſs, and you ſhall have it:" and if a perſon cannot diſcloſe ſuch a Caſe himſelf, as to ſhew he is aggrieved when he tells his own ſtory, and is not oppoſed or contradicted by any body; it is deciſive againſt his being in ſuch a condition as to want Relief.

Beſides the Practice, which is a deciſive evidence of the Law, it appears from a Caſe *(a)* Hilary, 8th King William, called Griffiths's Caſe, that the Court would not grant this Writ, until a probable cauſe was laid before the Court that the party was entitled to it.

(a) From a manuſcript of Lord Raymond, in poſſeſſion of Mr. Filmer.

When this Writ was firſt applied to relieve againſt private Reſtraints, does not appear; but whenever it was, the manner of iſſuing it ſeems to have been adopted from that of the Writ of Homine replegiando, which was the true common Law remedy for the aſſertion of liberty againſt a private perſon: and that Writ never iſſued of courſe, but was applied for by Petition to the Great Seal, and an Affidavit made,

made, diſcloſing the foundation on which it was prayed. State Trials, 3 Vol. 632. 2 Lill. Pr. Reg. 23. 2 Freeman, 27. Jennings's Caſe, upon Affidavit made, that Jennings had got a young Heireſs into his cuſtody without the conſent of the Guardian, upon the motion of the Attorney General, a Homine replegiando was granted. And as the Law checked that Writ of Homine replegiando; the Habeas Corpus, which ſeems by Practice to have been ſubſtituted in its place, took the check along with it.

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Careful as the Law is to prevent this Writ from being abuſed, it cannot always prevent it: for if a man does not diſcloſe the whole Caſe, it may iſſue ſometimes where it would not have iſſued, if the Caſe had been fairly ſtated.

I will mention one Caſe, which happened laſt term, and which ſhews the reaſon of the Law, in expecting to ſee a full ſtate of the Caſe before the Writ iſſues:

A gentleman applied to a Judge of the Court of King's Bench in Vacation time, for a Habeas Corpus to his Wife's mother, to bring up his Wife, upon an Affidavit of detention of her from him. As it was near Term, the Writ was returnable firſt day of Term.

The fact was, that they had entered into Articles of Separation, which had determined his right to the cuſtody of his Wife; the mother brought the Wife into Court, and returned the Articles of Separation. The Return was of great length, and the Mother was put to a very great expence in the making it, and if ſhe had brought her Daughter from the remoteſt part of the Kingdom, ſhe could have had no ſatisfaction at all.

If the Affidavit had diſcloſed the Articles of Separation, as it ought to have done, the Court, or Judge, would have ſaid, "you have no right

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right to the Relief you pray, and therefore muſt not put the Parties to coſts and vexation, in a Caſe which is remedileſs of your own ſhewing."

2d Queſtion. Whether in Caſes, not within the ſaid Act, ſuch Writs of Habeas Corpus, by the Law as it now ſtands, may iſſue in the Vacation by Fiat from a Judge of the Court of King's Bench, returnable before himſelf?

Anſwer. I am of Opinion that in Caſes, not within the Act of the 31ſt Car. II. Writs of Habeas Corpus ad ſubjiciendum, by the law as it now ſtands, may iſſue in the Vacation by Fiat from a Judge of the Court of King's Bench, returnable before himſelf.

From the beſt Inquiry I can make, Writs of Habeas Corpus, in criminal Caſes, have been awarded by the Chief Juſtice of the King's Bench, and the Judges of that Court, long before the 31ſt Car. II.

The files of the Fiats for Writs made out in the Crown Office before the Reign of Car. II. are not to be found there, except for four or five Terms in Queen Elizabeth's time, one or two in James I. and for ſix or ſeven Terms in Car. I.

No information is to be had from the Records; but there are traces from Caſes in print, and from Fiats ſince the Reſtoration, and before the 31ſt Car. II. that there had been a kind of unſettled Practice for the Chief Juſtice, and Judges of the Court of King's Bench, granting them in Vacation; and as the Judges of that Court are Juſtices of Peace all over the kingdom, they have a power of Bailing, as incident to that Authority; and I don't ſee how that power of Bailing could well be exerciſed, without removing the perſon to be bailed before them by Habeas Corpus.

Cateſby's Caſe in Vacation, is in Hilary, 43 Eliz. in the 7th vol. of the State Trials, 175.

I have

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I have a liſt of Fiats for Habeas Corpus, ſince the Reſtoration, and before the 31 Car. II. Thirty of them appear to have been granted and made returnable before the Judges in Vacation. Since the 31 Car. II. theſe Writs have iſſued, in criminal Caſes, under that Act, when granted at the inſtance of a Subject.

As to Writs of Habeas Corpus in Caſes of private cuſtody, I cannot aſcertain the commencement of their being firſt iſſued by the Court.

By the common Law, the liberty of a man's perſon againſt private perſons, acting without any legal authority, was protected in this manner:

1ſt. Firſt, the Law gave every man a right to repel force by force, and to defend his Liberty in the ſame manner as he might his Life.

2d. As every unlawful Impriſonment was a breach of the Peace, it muſt be proceeded againſt as ſuch, by Juſtices of Peace; and the delivery of the Party perhaps enforced by a rigorous execution of that Authority. It might alſo be puniſhed by Indictment. Satisfaction might likewiſe be recovered for the injury, by an Action of falſe Impriſonment.

The Writ of Homine replegiando, as mentioned before, was the only ſpecific remedy provided by the common Law, for the protection and defence of his Liberty, againſt any private invaſion of it.

Though there is an "obiter" ſaying by Juſtice Wild, in Carter, 222. of a Caſe where the Court ſent a Habeas Corpus to Dr. Prujean, beyond ſea, for Sir Robert Carr's brother, yet it is ſo looſely ſtated, I lay no ſtreſs upon it.

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The firſt Caſe is the Caſe of Sir Philip Howard, mentioned in Lord Leigh's Caſe, and therefore muſt have been before that time. Lord Leigh's Caſe was in the 27 Car. II. where Habeas Corpus was granted to bring up his Wife. And the Caſe of Viner and Emmerton was in the 27th year of Car. II. where a Habeas Corpus was granted to Viner to bring up his Daughter-in-Law, viz. his Wife's daughter by a firſt huſband. From that time to this, the Court has conſtantly granted them.

When the Practice of the Chief Juſtice, and the Judges of the Court of King's Bench, granting theſe Writs in Vacation, in Caſes of private cuſtody, firſt began, does not appear; but in all probability, it was either coeval with what the Court did, or very ſoon followed it; becauſe the principle which ſupports the one, concludes as forcibly to the ſupporting the other: and the principle is this; if the Writ is applicable to one ſpecies of unlawful impriſonment, it is in reaſon equally applicable to another. They are Caſes "ejuſdem generis;" and therefore let the uſage of iſſuing this Writ have begun ſooner or later, it was in the firſt inſtance a warrantable extenſion of a legal remedy in one Caſe, to another Caſe of the ſame nature; and I conſider the Uſage in this Caſe as the voice and teſtimony of the Judges, for near eighty years together, to the legality of the very firſt application of it.

The principle upon which the Uſage was founded, lay in the Law; and the Uſage is nothing but a drawing that principle out into action, and a legal application of it to attain the ends of Juſtice. It is upon this foundation only, that an infinite variety of Forms, Rules, Regulations, and modes of Practice in all Courts of Juſtice muſt ſtand, and can only be ſupported.

In

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In many inſtances, an Uſage for ſome time is conſidered as an evidence of an antecedent immemorial Uſage, and therefore may be called the Common Law. 2 Co. 16. b. Lane's Caſe. "The cuſtoms "and courſes of the King's Courts are as a Law. The courſe of a "Court makes a Law."

But when the commencement of an Uſage can be fixed and aſcertained, it cannot be ſupported by a preſumption, and the legality of the Uſage muſt then depend upon ſome other principle; and that principle is this, "ubi eadem eſt ratio, ibi idem eſt jus;" a Writ applicable to one kind of impriſonment, is in reaſon equally applicable to another.

It would be endleſs to enumerate inſtances where the King's ſupreme Courts of Juſtice in Weſtminſter Hall have, for the eaſe and benefit of the Suitors of the Court, reformed, amended, and new moulded and modified their Practice, as from experience and obſervation they found it would beſt advance, improve, and accelerate the adminiſtration of Juſtice; and all acts done by Judges at their Chambers, and by Officers of the Court, either in Term or out of Term, are under a delegated authority from the Court. They are controulable by the Court, and obedience to them muſt be enforced by the Court. And the acts done in Court and out of Court, taken together, form that ſyſtem of Practice by which the benefit of the Law is dealt out to the people.

I will mention an inſtance where a Writ has been extended by Uſage to a purpoſe much beyond the original intention of it, viz. "Ne exeat regnum;" which is a State Writ to reſtrain people from going abroad; firſt uſed to hinder the Clergy from going to Rome; then extended to Laymen, machinating and concerting meaſures

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againſt the State; now applied to prevent a ſubterfuge from the juſtice of the nation, though in matters of private concernment, in order to get Bail for an equitable demand, upon Affidavit of intention to go abroad.

The legality of that application was ſettled in Car. II.'s time, upon an Uſage firſt begun in the time of James I. 1 Ch. Ca. 115. Read againſt Read. 2 Ch. Ca. 245. If Uſage, where the commencement of it was known, could legitimate a Proceſs which is to take away a man's Liberty, ſurely Uſage, founded upon a legal principle, will legitimate a Proceſs which is applied to protect it.

I will mention a Caſe in the 13 Hen. VII. fol. 17. where the mode of Proceeding, in one kind of Action, was tranſlated to another, in favour of Liberty. Action of Treſpaſs—Plaintiff ſets forth that he was a Freeman, and that the Defendant claimed him to be a Villein, ſo that he durſt not go about his buſineſs, and that the Defendant had taken ſome of his goods; and he prayed that the Defendant might give Security to deliver them, and not take any more of them, or his body, pending the Writ. This was the practice in a "Homine replegiando;" and in a "Homine replegiando," the Plaintiff was to give Security to deliver his body in caſe the Action was determined againſt him.

It was reſolved they ſhould find ſecurity to one another, as if it had been a "Homine replegiando;" and the Court ſaid, "it was good diſcretion to favour Liberty as much as might be by reaſon." They applied the Proviſions applicable to one Writ, to another Writ, becauſe it fell under the ſame reaſon, and was to favour Liberty.

It has been lately ſaid, that the Practice of iſſuing theſe Writs by the Judges in Vacation, was taken up under an apprehenſion of their being within the 31 Car. II. and that they have been marked in the

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Crown Office by that Statute. How ſuch an apprehenſion or Practice could have prevailed, is to me inexplicable! No man could ever have ſuch an apprehenſion who had ever read the Act: it is confined in words, and by the nature almoſt of every proviſion in it, to criminal, or ſuppoſed criminal, matter.

As to marking them by the Statute, as there were fifty Writs in criminal Caſes, for one Writ in the Caſe of private Cuſtody, the miſtake might eaſily be made; if obſerved, could do no harm: it might quicken the returns; or be an inaccuracy in the Office: I lay no ſtreſs upon it; becauſe we ſee ſome few Writs of Habeas Corpus, iſſued by the Court, marked by the Statute, and yet the Act gives the Court of King's Bench no power of awarding theſe Writs, but leaves that power exactly as it found it; and therefore it might as well be inferred, that the Court thought their power was by the Statute, when their Writ was marked by the Statute, as that a ſingle Judge thought his power was by the Statute, becauſe the Writ was marked ſo.

I will never offer ſuch an indignity to the very great and eminent men who have preſided in that Court, and to the ſucceſſion of Judges who have ſat in it for near eighty years, as to ſay, that they founded this practice upon a miſtake which could not have infected the meaneſt capacity.

I muſt ſay they never read the Act if they thought ſo. And Griffiths's Caſe, already cited, ſhews that theſe kinds of Habeas Corpus were underſtood not to be within the Act.

Lord Chief Juſtice Hale does ſay, in ſecond Volume of Pleas of the Crown, 145. that this Writ is not regularly to iſſue but in the Term time, when the Court may judge of the Return, or bail or diſcharge the priſoner; and in page 147, he ſays, it ſeems, "regularly,"

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this Writ ſhould iſſue out of the Court of Chancery in Vacation time, and out of the King's Bench in Term time.

That word "regularly," alludes to ſome unſettled Practice of the Judges iſſuing that Writ in Vacation.

This was a noble, but a poſthumous, work, not fitted by him for the preſs, nor corrected; and, I have heard, a Collection of Notes made by him before the Reſtoration.

If it was, then the Precedents and Practice ſince the Reſtoration, were not taken into his conſideration; and yet the Practice after the Reſtoration, and even his own Practice, varied the Law extremely from what he aſſerted it to be in his book: for he ſays, that this Writ iſſues for matter only of Crime; and that aſſertion is confuted by his own Practice, becauſe he was Chief Juſtice when the Writs were awarded in Lady Leigh's Caſe, and Viner's Caſe, in the 27 Car. II. which were not for matters of Crime, but for private cuſtodies; and Viner's Caſe ſeems to have been as much agitated as any Caſe could be, and there never was the leaſt objection to the Court's right of awarding the Writ. That circumſtance is deciſive againſt his Authority upon the nature of this Writ; or rather a declaration that he changed his opinion, and thought it might iſſue for other matters.

In 2 Inſ. 53. and 4 Inſ. 81. 182. Lord Coke ſays, "it ought to iſſue "out of the Court of King's Bench in Term time, and out of Chan- "cery either in Term time or Vacation." All Writs, in ſuppoſition of Law, do iſſue in the Term; and he might mean no more, than that Judges could not grant them by their own proper authority, as ſeparate and detached from the Court, as they iſſue Warrants.

Firſt, this was no judicial determination; a mere "prolatum," which, as to the Court of Chancery, is very doubtful. For no Writ

of

of Habeas Corpus can be found to have ever iſſued out of the Court of Chancery, except ſome returnable in the Houſe of Lords. The 16 Car. I. takes no notice of the Court of Chancery, which it is moſt probable it would have done, if it had been thought that the Writ had iſſued out of that Court in Vacation. And the 31 Car. II. ſeems to proceed upon a ſuppoſition, that it could not iſſue out of the Court of Chancery, becauſe the 10th Section expreſsly empowers the Court of Chancery to grant it, which would have been unneceſſary, if it could have granted the Writ before; and it only ſhews, what I really take to be the truth of the Caſe, that there was no ſettled fixed Practice, then eſtabliſhed, of their iſſuing in Vacation; but if they could not, nor ever did iſſue out of the Court of Chancery, it is the ſtrongeſt reaſon that can be urged in ſupport of the Practice of iſſuing theſe Writs by the Judges of the Court of King's Bench, in Vacation, before the Statute, becauſe there could not otherwiſe have been a perfect and complete remedy at all times for the ſubject againſt impriſonment, for a bailable Offence at the Common Law, and before the Statute of 31 Car. II.

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That Act proceeds upon a ſuppoſition of a Practice of that kind then prevailing. To what purpoſe is the Writ to be marked by the Statute, if the Judges, in Vacation, could iſſue no Writ of Habeas Corpus ad ſubjiciendum, but under this Statute? That direction was to diſtinguiſh this Writ, when iſſued at the ſuit of a ſubject to be bailed, from every other Writ of this nature, which the Judges in Vacation might iſſue: not meant to give a power which they did not exerciſe before, but to reduce an unſettled, informal, vague Practice, into a formal regular Syſtem, as to the bailing for bailable Offences, and to correct the abuſe of any power which they had in fact exerciſed.

But

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But upon Lord Coke's own principles, ſuppoſe no ſuch Practice when he wrote, yet a ſubſequent Practice, founded upon legal principles, and an experience of its utility, has made the Law; "per varios actus legem experientia fecit." Lord Coke's averment has not the weight it would have had, if made after 31 Car. II.; according to his own principles, the Practice would have made it Law; and as it appears by the Fiats between the Reſtoration and the 31 Car. II. that three Chief Juſtices, Foſter, Hyde, Keyling, and four Judges of the Court, Morton, Twiſden, Mallet, and Wyld, granted theſe Writs in Vacation, and the Practice is warranted by legal principles, and it is admitted they were always grantable "pro Rege," (which eſtabliſhes the Vacation right) the opinion both of Lord Hale and Lord Coke may be true; and, upon Lord Coke's own principle, if he had written twenty years after the Reſtoration, inſtead of thirty years before it, he muſt have been of the Opinion I now give.

As to the 4th *(a)* and 5th Queſtions upon your Lordſhips Paper, viz.

4th Queſtion. Whether, at the Common Law, and before the Statute of Habeas Corpus in the 31 King Car. II. any, and which, of the Judges could regularly iſſue a Writ of Habeas Corpus ad ſubjiciendum, in time of Vacation, in all or in what Caſes particularly?

5th Queſtion. Whether the Judges at the Common Law, and before the ſaid Statute, were bound to iſſue ſuch Writs of Habeas Corpus ad ſubjiciendum, in time of Vacation, upon the demand of any perſon under reſtraint, or might they refuſe to award ſuch Writ if they thought proper?

(a) At the Requeſt of the Judges, the 3d Queſtion was waived by their Lordſhips.

Anſwer.

Anſwer. I think the Chief Juſtice of the Court of King's Bench, and the other Judges of that Court, did in fact iſſue them in Vacation, before 31 Car. II. in criminal Caſes, and might do ſo on principles of Law; poſſibly it might be done at firſt for the King only, and afterwards for the Subject; but I do not think there was any ſettled courſe of Practice obſerved in granting them before the Statute, and that ſuch unſettled manner of Practice produced the Statute in the Caſes of bailable offences: and, in Caſes out of the Act, Uſage has now fixed a regular courſe or manner of granting them; but I deſire to be underſtood, that the preſent Uſage of granting them muſt be ſupported upon ſuch principles of Law, as would have ſupported the granting them when ſuch Uſage firſt began. And I think they were not bound to grant them upon the demand of any perſon under reſtraint, at the Common Law, and before the Statute, any more than they are bound to grant them now upon demand. There muſt have been ſome Caſe made, before they could be bound to grant them at any time.

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6th Queſtion. Whether the Judges, at the Common Law, and before the ſaid Statute, were bound to make ſuch Writs, ſo iſſued in time of Vacation, returnable "immediaté;" and could they enforce obedience to ſuch Writ ſo iſſued in time of Vacation, if the Party ſerved therewith, ſhould neglect or refuſe to obey the ſame, and by what means?

Anſwer. I am of Opinion, that the Judges at the Common Law, and before the ſaid Statute, were not bound to make Writs of Habeas Corpus ad ſubjiciendum, iſſued in Vacation time, returnable "immediaté;" becauſe I find by the Files of Fiats for theſe Writs before the Statute, that they were ſometimes made returnable "immediaté," and

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and ſometimes in Term time; and I think the Judges cannot enforce obedience to any Writs of Habeas Corpus, iſſued in time of Vacation, (whether they iſſue in Caſes within the 31 Car. II. or in Caſes out of that Act) if the Party ſerved therewith, ſhould neglect or refuſe to obey the ſame, by any means but by Attachment for a Contempt, which can only iſſue out of Court in Term time.

7th Queſtion. Whether, if a Judge, before the ſaid Statute, ſhould have refuſed to grant the ſaid Writ upon the demand of any perſon under any reſtraint, had the Subject any remedy at Law, by Action or otherwiſe, againſt the Judge for ſuch refuſal?

Anſwer. I think that the Subject had no remedy at Law, by Action or otherwiſe, againſt the Judge for ſuch refuſal. The denying a Writ ſtands upon the ſame ground as any other breach of duty.

8th Queſtion. Whether, in caſe a Writ of Habeas Corpus ad ſubjiciendum, at the Common Law, be directed to any Perſon returnable "immediaté," ſuch perſon may not ſtand out an Alias and Pluries Habeas Corpus, before due obedience thereto can be regularly enforced by the courſe of the Common Law?

Anſwer. I am of Opinion, that in caſe a Writ of Habeas Corpus ad ſubjiciendum, at the Common Law, be directed to any perſon returnable "immediaté," the Court, upon the Affidavit of the ſervice of the Writ, will grant a Rule for an Attachment.

By the courſe of the Common Law, he might have ſtood out an Alias and Pluries; but by Practice the courſe is now altered, and in many Caſes the Court has enforced obedience to a Writ for private reſtraints, in the firſt inſtance, by Attachment, for the furtherance of Juſtice. The method of proceeding by Alias and Pluries, is gone into

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into diſuſe, in almoſt all Caſes, and the proceſs by Attachment ſubſtituted in its ſtead; and that Practice ſtands upon this legal principle;—that diſobeying the King's Writ is a Contempt, and equally a Contempt to diſobey the firſt Writ as the laſt.

9th Queſtion. Whether the ſaid Statute of the 31 Car. II. and the ſeveral Proviſions therein made for the immediate awarding and returning the Writ of Habeas Corpus, extend to the Caſe of any man compelled, againſt his will, in time of peace, either into the Land or Sea Service, without any colour of legal Authority; or to any Caſes of Impriſonment, Detainer, or Reſtraint whatſoever, except Caſes of Commitment for criminal, or ſuppoſed criminal, matters?

Anſwer. I think they do not extend to the Caſe of a man ſo compelled; becauſe the perſon who compels a man againſt his will, in time of peace, either into the Land or Sea Service, without any colour of legal Authority, is the Criminal, and not the man impreſſed. And I think that Act doth not extend to any Caſes of Impriſonment, Detainer, or Reſtraint whatſoever, except Caſes of Commitment for criminal, or ſuppoſed criminal, matters. * * *

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10th Queſtion. Whether, in all Caſes whatſoever, the Judges are ſo bound by the Facts ſet forth in the Return to the Writ of Habeas Corpus, that they cannot diſcharge the perſon brought up before them, although it ſhould appear moſt manifeſtly to the Judges, by the cleareſt and moſt undoubted Proof, that ſuch Return is falſe in fact, that the perſon ſo brought up is reſtrained of his liberty by the moſt unwarrantable means, and in direct violation of Law and Juſtice?

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Anſwer. I am of Opinion, that in no Caſes whatſoever, the Judges are ſo bound by the Facts ſet forth in the Return to the Writ of Habeas Corpus, that they cannot diſcharge the perſon brought up before them, if it ſhall moſt manifeſtly appear to the Judges, by the cleareſt and moſt undoubted Proof, that ſuch Return is falſe in fact, and that the perſon ſo brought up is reſtrained of his liberty by the moſt unwarrantable means, and in direct violation of Law and Juſtice. But by the cleareſt and moſt undoubted Proof, I mean the Verdict of a Jury, or Judgment on Demurrer, or otherwiſe in an Action for a falſe Return: and in caſe the Facts averred in the Return to a Writ of Habeas Corpus, are ſufficient in point of Law to juſtify the Reſtraint, I am of Opinion, that the Court or Judge, before whom ſuch Writ is returnable, cannot try the Facts averred in ſuch Return, by Affidavits, in any Proceeding grafted upon the Return to ſuch Writ of Habeas Corpus.

The cleareſt and moſt undoubted Proof in the Law, is the Verdict of a Jury; and if the Facts, ſet forth in a Return, are diſproved by a Verdict, I think the Judges are not bound by thoſe Facts in any Caſe whatſoever, from diſcharging the perſon brought up before them; but as I preſume the Queſtion means, "Proof by Affidavit," in order to examine the truth or falſity of a Return; I ſhall conſider the Queſtion in that view.

To get at the bottom of it, the nature of this Writ muſt firſt be conſidered: It is a Demand by the King's Supreme Court of Juſtice to produce a perſon under Confinement, and to ſignify the reaſon of his Confinement.

In Impriſonment for criminal Offences, the Court can act upon it only in one of theſe three manners:

1ſt. If

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1ſt. If it appears clearly that the Fact, for which the Party is committed, is no crime; or that it is a crime, but he is committed for it by a perſon who has no Juriſdiction, the Court diſcharges.

2d. If doubtful whether a crime or not, or whether the Party be committed by a competent Juriſdiction; or it appears to be a crime, but a bailable one, the Court bails him.

3d. If an Offence not bailable, and committed by a competent Juriſdiction, the Court remands or commits.

The nature and quality of the Fact with which the party is charged, and the Juriſdiction which has taken cognizance of it, are to be conſidered on the Return; but the exiſtence of the Fact, that is, whether ſuch a Fact was committed, or whether there is ſuch a Warrant of Commitment as the Gaoler has returned, is a matter which belongs "ad aliud examen." The Court ſays, "tell the reaſon why you confine him." The Court will determine whether it is a good or bad reaſon; but not whether it is a true or a falſe one. The Judges are not competent to this Inquiry; it is not their Province, but the Province of a Jury, to determine it: "ad queſtionem juris, non facti, Judices reſpondent." The Writ is not framed or adapted to litigating Facts: it is a ſummary ſhort way of taking the Opinion of the Court upon a matter of Law, where the Facts are diſcloſed and admitted; it puts the Caſe exactly in the ſame ſituation as if an Action of falſe Impriſonment had been brought, and the Defendant had ſet forth a ſeries of Facts to juſtify the Impriſonment, and the Plaintiff had demurred to the Plea. A Return is the ſame as the Juſtification demurred to; but, in both Caſes, if the Facts are controverted, they muſt go to a Jury; and when the Return to a Habeas Corpus is made and filed, there is an end of the whole Proceeding, and the

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Parties have "no day" in Court; and therefore it is impoſſible that a Proceeding, by way of Trial, ſhould be grafted upon it.

All the Arguments upon the Habeas Corpus, in the ſeventh Volume of the State Trials, 123. 156. take it for granted that it is impoſſible to go out of the Return; and Mr. Calthorp, who was Recorder of London, a very ingenious man, and argued for the Subject, lays it down, "that it ought to be preciſe and direct, ſo as to be able to "judge of the Cauſe, whether ſufficient or not. For there may not "any doubt be taken to the Return, be it true or falſe; but the "Court is to accept the ſame as true; and if it be falſe, the Party "muſt take his remedy by Action upon the Caſe."

Mr. Selden likewiſe in his Argument in the ſame Book, page 156, ſays, "The Keeper of the priſon returns by what Warrant he detains "the priſoner, and with his Return fixed to his Writ, brings the Pri-"ſoner to the bar at the time appointed: when the Return is thus "made, the Court judgeth of the ſufficiency or inſufficiency of it, "only out of the body of it, without having reſpect to any other "thing whatſoever; that is, they ſuppoſe the Return to be true, "whatever it be; if it be falſe, the Priſoner may have his Action on "the Caſe againſt the Gaoler that brought him." And it is for this reaſon the Law requires ſuch exact critical certainty in Returns, becauſe the Party can have no anſwer to it upon the Return. Nothing can be pleaded to it. It muſt be taken to be true, until twelve men, upon their oaths, have ſaid that it is falſe.

To enter into a diſquiſition of this ſort upon Affidavits, would be confounding the offices of Judge and Jury, and introducing a mode of Trial where no iſſue is or can be joined. The Parties, in ſuch a ſummary way of Trial, muſt loſe the benefit of a "viva voce" Examination,

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nation, where the looks, the manner, and deportment of the witneſs, are extremely material to confirm or diſcredit his teſtimony: it is found by the experience of ages, that nothing does ſo effectually explore the Truth as a croſs-examination, which ſtrikes ſo ſuddenly that fiction can never endure it.

Another deciſive reaſon againſt this mode of Trial, is, that there is no compulſory method of forcing men to ſwear Affidavits; ſo that if a perſon were obliged to prove the truth of his Return by Affidavit, he is totally deſtitute of any means of obliging men to make Affidavits to prove them.

Another reaſon is, that the Parties are entitled to no Coſts upon the Return to a Habeas Corpus; and if the Court pronounces a wrong Judgment upon the Facts, there is no method of controverting it. But in an Action for a falſe Return, Witneſſes may be compelled to appear, and muſt be examined "viva voce." Coſts will follow the event of the Trial. If the Verdict is falſe, or contrary to Evidence, the Law has eſtabliſhed a legal method of controuling it.

Writs of Mandamus ſtood exactly upon the ſame foundation. They are both the King's mandatory Writs, iſſued at the inſtance and for the relief of the Subject. The Anſwer to them ſhall be taken to be true, till it has undergone that examination which the wiſdom of our anceſtors has eſtabliſhed for the deciſion of Facts. And the Law gave ſuch credit to Returns of theſe Writs, that they would not even ſuffer the Facts to be denied and brought to Trial before a Jury in that courſe of Proceeding. "You have aſked a Queſtion; you ſhall take the Anſwer as it is given you: if it is inſufficient in point of Law, the Judges will give inſtantaneous Relief; if it is falſe in Fact,

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Fact, you have received an injury; vindicate yourſelf againſt that injury by an Action, and when you have proved the Fact to be falſe, you will be entitled to a complete Relief."

This Rule was adhered to ſo ſtrictly, that even in the caſe of annual Offices in Corporations, where the Offices would expire before the truth or falſity of a Return to a Mandamus could be tried in an Action for a falſe Return, the Law would not ſuffer the Return to be traverſed.

In 9th Queen Anne, an Act of Parliament was obtained, to permit the traverſing Returns to Mandamus's for ſuch Offices as are within that Act; and all Offices, not within that Act, ſtand as they did at the Common Law; and the Facts, though ever ſo falſe, cannot be diſproved but in an Action for a falſe Return, or in ſome Caſes by an Information.

This is a ſtrong Parliamentary Declaration of what the Law is, upon Returns to Writs of Mandamus, which are always conſidered as ſtanding upon the ſame foundation as Returns to Writs of Habeas Corpus.

I have looked through the Books as carefully as I can, and ſo far from finding an inſtance of their being controverted by Affidavit, where a perſon has been in cuſtody of an Officer under a legal Authority, there is not an inſtance where the Party is let in upon the Record of the Return to traverſe any of the Facts contained in it; but if that might have been done, yet it does not contradict my aſſertion, becauſe a Traverſe carries it to its proper manner of Trial, a Trial by Jury.

There are two Caſes, King and Gardiner, Cro. Eliz. 821. Trem. 354. Swallow and the City of London, 1 Syd. 287. where Facts, conſiſtent with the Return, have been let in to be averred: I will cite

cite them, because they shew that even Facts, confessing the Truth of the Return, and avoiding it, must go to the Jury.

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A Bailiff going to arrest a Justice of the Peace, he carried with him a hand-gun: the 33 Hen. VIII. prohibits all persons from carrying such weapons. The Justice sends out his servant and apprehends him for carrying this hand-gun; the Justice convicts him upon the Statute for the penalty, and sends him to gaol till he paid the penalty. Gardiner brings a Habeas Corpus, and removes himself into Court. The Return was the Warrant of Execution, where the Fact of his being a Sheriff's Officer did not appear; but the matter being disclosed to the Court, it was thought to be no offence, and that a minister of Justice might carry a hand-gun. How was it to be come at? This was a Fact which did not contradict the Return, but confessed and avoided it; and yet the Court would not interpose by Affidavit: they ordered a Plea to be put in, comprising the whole matter, and upon the King's Coroner and Attorney confessing the Plea, the man was discharged. But if it had been controverted, the Plea put it into such a method, as would bring the Fact to that form of Trial, which the Law has established as the best for investigating Truth.

In the other Case, Swallow was committed by the Court of Aldermen to Newgate, for refusing to accept the Office of Alderman, to which he had been elected by the Ward where he lived; he was brought up by Habeas Corpus; after the Return filed, it was moved for him to have leave to plead to the Return, that he was an Officer of the Mint, and by Charter exempt from all Offices—not a hint at an Affidavit, and they put him to a Writ of Privilege, besides the Plea; and as Facts confessed and avoided the Return, it was admitted:

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mitted: but ſtill it brought the point to Trial by Jury; and it was agreed in that Caſe, that matter, contrary to the Return, could not be pleaded, but the Party is put to his Action for the falſe Return.

It appears by Sir G. Treby's Report, February 1688, that the Houſe of Commons came to Twenty-eight Reſolutions, to be carried into the Bill of Rights. Many of them were afterwards dropped, and amongſt the reſt, the Twenty-fifth, which was, "That the Subject "ſhould have liberty to traverſe Returns to Writs of Habeas Corpus "and Mandamus."

This doctrine is echoed through all the Books for three or four hundred years together. Y. B. 9 Hen. VI. fol. 44. Babington, who was then Chief Juſtice; "If the Cauſe appear to us ſufficient in itſelf, notwithſtanding it be falſe, it is enough for us upon the Return, which the whole Court agreed. And if he had returned that he was his Villein, this ſhall not make an Iſſue here, whether he be his Villein or not: wherefore, if you cannot prove but that the cauſe is ſufficient in itſelf, he ſhall be ſent back again." 11 Coke 99. Bagges's Caſe. 12 Coke 129. Hawkeridge's Caſe: "that upon an inſufficient Return, the Party muſt be bailed or diſcharged; otherwiſe, if Return ſhall be ſufficient, when it is falſe." Godbolt, 129. If the Return is falſe, the Party cannot be delivered. 8 Co. 127. b.

I find no Authority which warrants a difference between Returns, when filed to Writs of Habeas Corpus in Caſes of private cuſtody, and of public cuſtody, where the Facts juſtifying the Impriſonment have been ſet forth; that is, where there has been a full, complete, ſufficient Return.

For as to Returns of Proceſs, which are to bring Parties into Court, in order to have the Right tried and examined, when the Court is proceeding

proceeding not "legem dicere," but only "ſiſtere in judicio." The Court often proceeds in a ſummary way upon ſuch Returns for the expedition of Juſtice; the Court will not ſee their Proceſs diſobeyed and eluded by tricks and falſities; and the Caſe of Emerton and Viner, which was in Hilary Term, 26 and 27 Car. II. and Eaſter and Trinity Terms, 27 Car. II. ſeems to have proceeded upon this principle. It is reported in 3 Keb. 434. 447. 470. and 504. 2 Lev. 128. Freeman, 389. 401. 522.

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I will ſtate the Caſe particularly, as it appears upon the Record. In Hilary Term, 26 and 27 Car. II. a Habeas Corpus iſſued to Sir Robert Viner, Lord Mayor of London, for the body of Bridget, the only daughter and heir of Sir Thomas Hyde. (Note, Sir Robert Viner had married Lady Hyde, the mother of Bridget, who was then dead.) In the ſame Hilary Term, an "alias" Habeas Corpus iſſued under the penalty of £. 40.; and afterwards in the ſame Term, a "pluries" Habeas Corpus iſſued under the penalty of £. 500.

Sir Robert Viner to the "pluries" returned, that Bridget, the only daughter and heir of Sir Thomas Hyde, Knight, mentioned in the Writ, at the time of the receipt of the aforeſaid Writ, or ever afterwards to that time, was not in his cuſtody, as by the ſaid Writ is ſuppoſed; and for that reaſon he could not have the ſaid Bridget before the King at the day and place mentioned in the Writ, as by the ſaid Writ he was commanded.

A Rule was then made that the Return ſhould be filed, and Counſel be heard thereupon the next day. Upon that next day, the day after was given to Sir Robert Viner's Counſel to ſpeak to the Return, and upon that next day, which was Saturday, this Rule was made. "Upon the undertaking of Mr. Jefferys, as Counſel for Sir Robert

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Viner, upon the Writ of Habeas Corpus for the body of Bridget Hyde, that the ſaid Robert Viner ſhould bring the ſaid Bridget into Court on Wedneſday next, it is Ordered, that no Proceſs in the mean time ſhould be made out thereupon againſt the ſaid Sir Robert Viner."

Upon the Wedneſday, the following Entry was made: " Bridget the only daughter and heir of Sir Thomas Hyde, Knight, being brought here into Court, in the cuſtody of Sir Robert Viner, Knight, denied to remain in the cuſtody of the ſaid Sir Robert Viner." Upon the Friday afterwards, which was either the laſt day of the Term, or very near the laſt day of the Term, the following Rule appears to have been made: " It is Ordered, that Sir Robert Viner, before the end of next week, ſhall bind himſelf before the Juſtices of this Court, or one of them, in a Recognizance of £. 40,000. upon condition that the ſaid Sir Robert Viner, before the end of the next week, between the entering into that Recognizance, and one month next after Eaſter then next enſuing, ſhould not, directly or indirectly, cauſe or procure, or knowingly conſent, that the ſaid Bridget, then being in the houſe of the ſaid Sir Robert Viner, ſhould be married or contracted in marriage with or to any perſon whatſoever, or ſhould be ſolicited in order to marry with any perſon whatſoever, or ſhould be delivered into the hands or cuſtody of any perſon whatſoever, out of the cuſtody of the ſaid Sir Robert Viner; and if the ſaid Sir Robert Viner ſhall not enter into ſuch Recognizance before the end of the next week, then let a Writ of Attachment iſſue againſt him for a Contempt: and it is further Ordered, that the ſaid Sir Robert Viner ſhall permit Lady Acheſon, the godmother, and the uncles and aunts of the ſaid Bridget, and the ſons and daughters of the

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ſaid uncles and aunts (except John Emerton, one of her couſins) to have acceſs to her, in order only to viſit her, every Monday, Wedneſday, and Friday, in every week, between the time of entering into the ſaid Recognizance and one month next after Eaſter, between the hours of four and ſeven in the afternoon: and it is further Ordered," by the conſent of Counſel on both ſides, " that the ſeveral Affidavits now delivered here into Court, of and concerning the ſaid Bridget, ſhould be filed here in Court upon Record." No Affidavits are mentioned or taken notice of in any of the ſubſequent Rules.

Theſe are all the Rules which appear to have been made in Hilary Term; but Emerton brought an Ejectment in that Hilary Term, upon the Demiſe of himſelf and Bridget his Wife, for a meſſuage and ſome lands in North Mymms, in the County of Hertford, in order to eſtabliſh his marriage, and that Ejectment appears by the Record to have been tried upon Tueſday next after five weeks from the Feaſt of Eaſter; and after this Trial at Bar, by which Mr. Emerton eſtabliſhed his marriage with Bridget Hyde, and upon the very ſame day of the Trial, a Habeas Corpus iſſued to Sir Robert Viner, teſted 11th May, to bring up the body of Bridget, the Wife of John Emerton, lately called Bridget Hyde, the only daughter and heir of Sir Thomas Hyde, returnable on Friday next after the Morrow of the Aſcenſion; then an "alias" iſſued, teſted 14th of May, and then a " pluries" iſſued, teſted 15th May; and to all theſe Writs of Habeas Corpus Sir Robert Viner made the ſame Return, which was, " that Bridget, the wife of John Emerton, lately called Bridget Hyde, the only daughter and heir of Sir Thomas Hyde, in the ſaid Writ mentioned, at the time of the receipt of the aforeſaid Writ, or of any

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other Writ of the King to him directed, or ever afterward to this time, was not, nor yet is, in his cuſtody, as by the ſaid Writ is ſuppoſed, and for that reaſon he could not have the ſaid Bridget at the day and place mentioned in the ſaid Writ, as by the ſaid Writ he was commanded." And upon the ſame day that theſe Writs were returned, it was Ordered, that the Returns ſhould be filed; and it does not appear that there were any other Proceedings on thoſe Returns in that Term.

But in the beginning of Trinity Term, there appears to have been a Rule made in the following words: "It is Ordered, that unleſs Sir Robert Viner ſhall immediately permit William Emerton and Owen Davies to ſee Bridget, the wife of John Emerton, the ſon of the ſaid William Emerton, or ſhall give notice to the ſaid William Emerton and Owen Davies, where the ſaid Bridget now is, that the ſaid Robert Viner ſhould attend the Court to-morrow;" and the next day, which was Saturday, a Rule was made, "that the ſaid Sir Robert Viner do attend the Court on Tueſday next without any further Notice." But upon the Monday a Rule was made, whereby "it was Ordered, that the ſaid Sir Robert Viner ſhould attend the Court on Wedneſday next peremptorily."

Upon the Thurſday afterwards, "it was Ordered, that Sir Robert Viner ſhould attend the Court the next day, and that Mr. Francis Woodward, one of the Officers of the Court, ſhould give him Notice of the Order." Upon that next day, which was Friday, a Rule was made, "that Sir Robert Viner ſhould attend the Court upon the day after, to inform the Court where Bridget Emerton, wife of John Emerton, then was; otherwiſe a Tipſtaff ſhould take him up and bring him into Court; and it was Ordered, that Mr. Barrington ſhould attend the

Court

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Court the ſame day." Upon the Wedneſday afterward a Rule was made, "that the Marſhal ſhould take up Sir Robert Viner upon the 30th day of October then next enſuing (the day after Lord Mayor's day, when he would have been out of Office) or as ſoon afterwards as he could take him, and bring him into Court." Early in Michaelmas Term, to wit on Wedneſday after one month of St. Michael, a Rule was made, "that the Marſhal ſhould take up Sir Robert Viner on the 13th November then next enſuing, or ſo ſoon afterward as he could take him; and that Mr. Emerton and his wife, and the other relations of the ſaid Bridget, ſhould, in the mean time, have free acceſs to her at all convenient times."

By theſe Proceedings it appears, that the Court was proceeding againſt him for a Contempt in diſobeying the Writ; and as Sir Robert Viner had returned, that the ſaid Bridget was not in his poſſeſſion at the receipt of any Writ, which was diſproved by the Record of their own Court (for the Rules I have ſtated ſhew ſhe was in his poſſeſſion) the Fact, averred by the Return upon the Record, was falſified by Evidence of equal dignity, viz. the Records of the Court, grafted upon Sir Robert Viner's own acts and admiſſions.

In the next place, it does not appear by any Acts of the Court, that any Affidavits were read; for though the laſt Rule of Court in Hilary Term mentions, that the ſeveral Affidavits delivered into Court concerning the ſaid Bridget Emerton, ſhould be filed; yet it does not appear from the Records that they were ever read; and it is obſervable, that they were filed by conſent of both Parties; and if any Affidavits were read, it could only be the Affidavits mentioned in that Rule; becauſe no notice is taken of any Affidavit in the ſubſequent Rules, and conſequently none could have been read to contradict the Return

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Return to the ſecond Habeas Corpus, becauſe they were made two months before the ſecond Habeas Corpus iſſued.

But ſuppoſe there had been no ſuch Proceedings upon the Record, and Affidavits had been read to ſhew that Bridget was in the cuſtody of Sir Robert Viner, it would not encounter the doctrine I lay down; for it was not a Return, averring Facts juſtifying the cauſe of Impriſonment, but only an excuſe for not obeying the Writ; and if it be falſe, the Court proceeds for a Contempt in a ſummary way in this Caſe as they would in all others. In Godbolt, 219. Smith, one of the Officers of the Court of Admiralty, was committed by the Court of Common Pleas to the priſon of the Fleet, becauſe he had made Return of a Writ, contrary to what he had ſaid in the ſame Court the day before. And to bring it home to my point, I would ſuppoſe there had been no Verdict, evidencing the marriage of Bridget with Emerton, and that Sir Robert Viner had returned, that Bridget was not the wife of Emerton, but his own wife: in caſe there had been no legal diſability, would the Court, upon Affidavits, have tried the Fact of that marriage?—If it were a Caſe of that nature, it had been in point—I apprehend clearly they could not, without uſurping a Power which the Law has not given them.

And it is further obſervable in that Caſe, that there never was any Rule made upon Sir Robert Viner to produce her. The compulſory Rule was, that unleſs he ſhould permit William Emerton and Owen Davies to ſee her, or give them Notice where ſhe was, he ſhould attend the Court.

The next compulſory Rule is, "that he ſhould attend to inform the Court where ſhe was, or otherwiſe that a Tipſtaff ſhould take him up and bring him into Court;" and the two ſubſequent Rules, for the Marſhal

Marſhal to take him up, and to bring him into Court, were in conſequence of his non-attendance.

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If they had conſidered the Return as duly falſified by Affidavit, and had proceeded upon that principle, they would have iſſued an Attachment for the Contempt in the firſt inſtance, as they had ordered in Hilary Term upon the inſufficiency of the firſt Writ. And as Sir Robert Viner was indictable for making a falſe Return, the Affidavits might be properly read, as a foundation for the apprehending him; and the rather, becauſe the marriage was eſtabliſhed, and the Court ſaw he was guilty of a great Offence in ſecreting and withholding a wife from her huſband.

Affidavits may be read to collateral purpoſes; as in order to bail, or adjuſt the ſum for which Bail is to be given; and in the Caſes of madmen, when they have been brought up without any formal Return at all, or only a Return, "that I have the body ready according to the command of the Writ." 22 Aſſ. Pl. 56. Battery and falſe Impriſonment: Defendant ſays Plaintiff was in a rage, and did great miſchief, whereupon the Defendant and his other relations took him and bound him, and put him into a houſe, and chaſtiſed and beat him with a ſtick or rod.

As there was no Return of a Fact juſtifying the cauſe of Impriſonment, the Judges were at liberty to look into it, and read Affidavits, to direct them what to do upon it. For as the Facts do not appear upon every Return, the Court, or Judge, can be enabled only from Affidavits to know whether they ſhould interpoſe or not;—if ſatisfied the Party was mad; though under no legal cuſtody—they would not interpoſe. If doubtful,—they would direct an application for a Commiſſion, or put it into ſome way of Inquiry; if quite ſatisfied it was a ſcene of oppreſſion,—they would ſet the Party at liberty.

So

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So in Caſes of Wives, Children, and Wards—all the Court, or Judge, does, is to ſee that the Party is under no illegal Reſtraint. The Law ſo laid down, 1 Str. 445. 2 Str. 982. The King and Smith.

In the Caſe of the King and Smith, Habeas Corpus was brought by the father againſt an aunt, for a child near fourteen; the Return was only "ready in Court." She made an Affidavit that the uncle had deviſed an eſtate to Truſtees, upon Truſt to pay her a yearly ſum for the child's maintenance, and directed the money ſhould be paid only to her; that the child had lived with her from its birth; that it was the uncle's deſire it might ſo continue, the father being a very extravagant perſon.

(a) Lord Hardwicke.

The noble Lord, *(a)* who then preſided in the Court, ſaid, "the De-
"tention being undefended, we muſt ſet the child at liberty: we can
"take no notice of the Juſtification in the Affidavit; we can deter-
"mine nothing about the poſſeſſion of the child: all the Court can
"do is to ſee that perſons are not unlawfully confined."

In all theſe Caſes, the Parties have opportunities of aſſerting their Title at Law, and may have the benefit of a Writ of Error. If we ſhould take upon us the ſummary determination of this Queſtion, it would debar the Parties of their Writ of Error, and ſuch other privilege as the Law has given.

The Remedies, which the Law has provided in different Caſes, ſhould not be confounded. If there are any Caſes where Facts have been entered into by Affidavit, upon Habeas Corpus, yet unleſs there have been Returns to ſuch Writs filed, and thoſe Returns have ſet forth a ſufficient Cauſe of the Impriſonment, and Affidavits have been read to contradict that Cauſe in point of fact, ſuch Caſes will not encounter the poſition I am now advancing.

A difference

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A difference is made between the Caſe of an Officer and a mere private perſon—a difference in favour of interpoſing upon the Return of an Officer, rather than of a private perſon, becauſe an Officer is a miniſter of Juſtice, and more under the controul of the Court than a mere ſtranger. If ſaid to be a wrong-doer—that is begging the queſtion; for it depends upon the truth or falſity of the Return, whether he is a wrong-doer.

If a lawful Cauſe of Reſtraint is not returned, the Party will be diſcharged for the inſufficiency of it; but the Facts, evidencing the legality, muſt not be preſumed to be falſe, in order to warrant an Examination whether they be falſe or not.

But ſuppoſe there was a diſtinction between Cuſtody by a public Officer, and a private perſon acting without any authority whatſoever; yet, in regard to preſſed men, they are in the Cuſtody of public Officers, acting under an authority given by Act of Parliament; they are under a neceſſity of receiving them; they take them as perſons within the deſcription of the Act; and if they return them to be ſo, they have a right to have that Fact tried by a Jury as well as any other Perſon. But it is not the privilege of an Officer, but of an Engliſhman, to have a Fact, juſtifying his conduct, and which he has averred upon Record, tried by a Jury.

It is ſaid, that it is a very hard caſe, and that a man may be ſent to the Weſt Indies before the falſity of the Return is proved in an Action.—If there be any particular hardſhip, the Act which produces the Caſe, muſt provide for it.

Judges will conſtrue the Law as liberally as poſſible in favour of Liberty, but they cannot make Laws; they are only to expound

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them: particular Caſes muſt yield to the Law, and not the Law to particular Caſes.

There is no difference between Facts in a Return, and any other Facts averred upon Record.

Suppoſe an Action brought upon a Bond for any given ſum of money, and the Party is arreſted upon it, and he pleads that he never executed the Bond; ſuppoſe he could ſhew by Affidavits ever ſo clearly, that he did not execute the Bond, or, by a copy of the Regiſter, that he was not born when it is dated. The Court could not interpoſe; why? Becauſe the Law ſays, the Fact muſt be tried by a Jury: the Judges have no more Cognizance or Power to try it than if they were not Judges.

If they were to do it where there was the cleareſt and moſt undoubted Proof, they muſt do it in every Caſe: for the degree of Proof cannot alter or vary the mode of Trial, and tranſlate the examination of the Fact from the Jury to the Judge.

If a man is arreſted and in Cuſtody, in a Civil Action, upon an Affidavit made by the Plaintiff of the Debt, the Court will not, even for the purpoſe of diſcharging him out of Cuſtody, enter into any examination of the reality of the Debt, though there is the moſt clear and undoubted Proof laid before the Court of the falſity of the Demand; it muſt be tried by a Jury. The Court cannot look at it. We muſt adminiſter juſtice, not as we wiſh the Law to be, but as it is.

Laws are framed upon principles of general utility, and adapted to ſuch Caſes as moſt frequently happen. Judges cannot ſet up natural reaſon againſt the reaſon of the Law—cannot diſpenſe with the Law, for

for the ſake of a particular Caſe, ariſing upon an Act which will expire with the Seſſion, and perhaps may never be enacted again; and in a Caſe, where the hardſhip may be prevented by making a Rule upon all the Parties concerned in ſupporting the right to the Recruit, that he ſhall not be carried away till the merits are tried in an Action; or by letting him out, on Security to return, if the merits are againſt him: and if the Caſe was ever ſo remedileſs, I think we are not warranted to impeach, by Affidavits, the truth of the Return of an Officer, acting under an Act of Parliament, which the Law ſays ought to be impeached by a Verdict.

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But the Caſe is not a remedileſs one: by the Common Law, the Writ of "Homine replegiando" will clearly relieve him. That Writ, whieh is obtained out of the Court of Chancery upon an Affidavit, goes to the Sheriff, and commands him to replevy the man. If he cannot replevy him, he returns it, and a Proceſs goes out inſtantly to ſeize the Body of the perſon who is ſuppoſed to have him in cuſtody, and he is impriſoned himſelf till he produces the Body. Fitzherbert, Nat. Bre. 67. b. (edition 1616.) 5 Hen. 7. 3.

If a perſon is ſeized by virtue of the firſt Writ, and the Party, who has him in Cuſtody, claims any right to the Detention of him, ſtill he is to be delivered, upon giving Security for his Appearance, and to try the right in a Court of Juſtice; and if the point is determined againſt him, to deliver himſelf up to the perſon in whoſe Cuſtody he was: ſo that, by this Writ, the Party may be inſtantly ſet at liberty, without violating any Rule of Law whatſoever; and where a perſon is in actual Cuſtody, the Sheriff will be ſure to find him and deliver him; and it is a more ſure and certain Remedy in that Caſe, than where a man is impriſoned by a mere private perſon, and may be ſhifted about ſo ſecretly, that the Sheriff cannot find him.

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There is another method by which a man impreſſed may get at his liberty, laying the Gaoler and the Return quite out of the Caſe: and that is, by appealing to that ſummary Juriſdiction, which the Court of King's Bench exerciſes over all inferior Juriſdictions, Powers, and Authorities whatſoever.

The Authority given to the Commiſſioners, being a particular, ſpecial Authority, if it is abuſed, they are anſwerable to the Court for it; and the Court will relieve the Party oppreſſed by it in a ſummary way, by Affidavits. But in that Caſe, the Complaint is founded on Affidavits, and therefore muſt be anſwered by Affidavits; and the Fact is tried, between the perſons who did the wrong, and the perſon who ſuſtained it.

The Crown, being intereſted in the Recruit, is likewiſe heard "pro intereſſe." The Gaoler is no Party to that Complaint or Inquiry; and as to him, the Fact, which he has averred upon Record, ſtands unimpeached; and if it is falſe, he muſt and can only be anſwerable for it in an Action: and by this mode of Proceeding, the Party acquires ſuch a Diſcharge as will completely work a manumiſſion of him from his condition of a Soldier.

For if a Gaoler ſhould let a man go, or return only that he had his Body ready, without ſhewing any Cauſe of his Impriſonment, or ſhould make an inſufficient Return, or a falſe Return; no man can ſay that an Act of the Gaoler can affect the right which the Public have in the Recruit. That muſt and can only be determined between the Commiſſioners and the Crown on the one ſide, and the Party impriſoned on the other.

The diſtinction, between a Proceeding by Habeas Corpus and upon Motion, I take to be this: In a Proceeding by Motion, the Court goes upon Affidavits; and it may take its riſe collaterally,

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various ways, out of diſputes which come before the Court upon Record. For inſtance, the Return to a Habeas Corpus cannot be tried and ſet aſide by Affidavits; but the Court may take the matter up "diverſo intuitu," in order to grant an Information againſt a man who has ſeized another by outrage and violence, and detains him without any colour of Authority; or perhaps to proceed againſt ſuch perſon by way of Information for a falſe Return, which Hale ſays is an indictable Offence; or in order to commit him for an outrageous breach of the Peace.

Suppoſe Habeas Corpus for a Maid taken away, according to the Statute of Philip and Mary, or of 3 Henry VII.;—by the one, a great Miſdemeanor,—by the other a Felony; and the Party returns that he is married, that ſhe is his wife. The Fact, or validity of the marriage, cannot be controverted upon the Return; but upon Affidavits the Court might commit him for a Miſdemeanor in one Caſe, and for a Felony in the other. And in Caſes where the Court has a Diſcretion as to bailing, the Court might put ſuch terms upon him as would force the immediate Relief of the perſon impriſoned and agreeable to theſe principles, is the King and White, Trin. 1745, where the Court would not diſcharge the impreſſed man, T. Reynolds, upon the Affidavits contradicting the Return; but being brought up on a Monday, and the Writ and Return, which was full and ſufficient, being filed, the Court ordered him to be brought up again on Wedneſday; and upon reading the ſeveral Affidavits of Reynolds and others on his behalf, made a Rule upon the Commiſſioners and the Maſter, to ſhew Cauſe the next day, why he ſhould not be diſcharged out of the cuſtody of the ſaid Richard White. The Rule was as follows:

Monday,

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Monday, 1ſt July 1745. "The Defendant being brought here into Court, in cuſtody of Richard White, Eſquire, Major of the Tower of London, by virtue of His Majeſty's Writ of Habeas Corpus, It is Ordered, by conſent of Counſel on both ſides, that the name Thomas White, mentioned in the ſaid Writ, be made Richard White: And it is further Ordered, That the ſaid Writ and Returns thereto be filed, and that the ſaid Richard White bring into this Court the body of the ſaid Defendant Thomas Reynolds on Wedneſday next; and upon reading the ſeveral Affidavits of Thomas Kell and others, George Stewart and others, Thomas Reynolds and John Mangaar, It is further Ordered, that Thomas Bedwell, Francis Bedwell, Charles Scriven, John Weſt, and John Robinſon (Commiſſioners under the Act) do to-morrow ſhew Cauſe why the ſaid Defendant ſhould not be diſcharged out of the cuſtody of the ſaid Richard White, upon Notice of this Rule to be given to them reſpectively in the mean time."

There is a deciſive mark upon this Rule, which ſhews the Court induſtriouſly avoided twiſting the Complaint againſt the Commiſſioners with the Return; becauſe they ordered the Rule on the Commiſſioners to come on at a different day: whereas, if the Affidavits had been levelled and pointed at the Return, the Court would have directed them to have come on together; and it is extremely material, that Major White is not ſo much as a Party to that part of the Rule which is upon the Commiſſioners; the Court conſidered the Return with regard to him as ſacred, and not to be litigated by Affidavits againſt him.

If the Court had meant to have impeached the truth of the Return by Affidavits, as between Reynolds the man impreſſed, and White the

the Gaoler, they would have certainly given White an opportunity of ſupporting the truth of his Return by Affidavits.

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Wedneſday. Sir John Strange for Major White, ſaid, the Queſtion was of great conſequence to the liberty of the Subject on the one hand, and to the ſervice of the Public on the other, and that there had not been time for him to be ſufficiently prepared: he propoſed therefore, without prejudice to the Queſtion, to admit him to Bail. The Rule upon the Commiſſioners was diſcharged; and it appears that the Defendant's Recognizance was afterwards diſcharged.

I have ſearched for Writs of Habeas Corpus and Returns to them, in Queen Anne's time. There are many; eight of the perſons are remanded, ſeven are diſcharged; as to ſome, it does not appear what was done. And in every Caſe where the Party was remanded, the Return appears to be good upon the face of it; where diſcharged, inſufficient upon the face of it.

I directed a ſearch to be made for Affidavits, or for any Rules that might have been made upon the diſcharge or remanding of the Parties. The Affidavits were ſtolen many years ago out of the Office; and there are no Rules to be found in the Rule-Book except one, in Bolton's Caſe, which I will mention by and by, and ſubmit to your Lordſhips, as the moſt deciſive Inſtance which can be produced, that the Return was ſacred, and could not be touched but by conſent.

As no more light could be got from that Inquiry, I then examined the Returns where the Parties were remanded and where they were diſcharged; and if I could have found two Returns in the ſame words, one where the perſon was remanded, and another where he was diſcharged, it

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it would have afforded a very ſtrong reaſon to have believed that ſome extrinſic collateral Evidence had been received, which had produced a Remand in the one Caſe, and a Diſcharge in the other; but as all the Returns where the Parties were remanded are ſufficient, and all the Diſcharges are in Caſes where the Returns are inſufficient, it demonſtrates moſt clearly to my ſatisfaction, that the Court proceeded only upon the ſufficiency or inſufficiency of the Return, on the face of it.

There is one Return of an enliſted Soldier, Alexander James, committed by the Captain to the Savoy, plainly inſufficient. The Captain is not ſtated to have had any Authority to commit, and no offence is ſtated for which the Soldier was committed; he is not ſo much as ſaid to be a Captain of the regiment in which he was enliſted.

The Caſe of Bolton is in Hil. 3d. of Queen Anne. A Rule *(a)* was made by conſent to refer it to Arbitrators, to determine whether he was ſuch a perſon as was within the deſcription of the Act. If the Court could have diſcharged upon reading Affidavits, why put it into any other mode of Enquiry? They ſaw it could be done only by Action for

(a) Die Merc. &c. S. Hill. Anno 3° Annæ Reginæ. Nicolaus Bolton ductus fuit iterum hic in Curia ſupra Breve de Habeas Corpus ad ſubjiciendum, &c. ſub cuſtodia Jer. Mahone generoſi; Et Ordinatum eſt, "ex aſſenſu ambarum partium," quod referetur Arbitrio & finali determinatione Wilhelmi Harvey, armigeri, Carew Harvey alias Mildmay, armigeri, & Thomæ Dawtry, armigeri, tribus Juſticiariis Pacis Com. Eſſex conjunct. cum Johanne Green, Servient. ad Legem, Johanne Wroth, arm. & Wilhelmo Stane, arm. tribus aliis Juſticiariis Pacis Comitat. predict. Utrum predict. Nich. Bolton, ſit talis perſona, qualis per Actum Parliamenti, intitulat. "An Act for raiſing Recruits for "the Land Service," &c. ſecundum formam Acti prædict. intenſ. eſt retineri, Anglice, "to be entertained" in ſervitio Dominæ Reginæ; quodque dictus Jeremias Mahone ducat predictum Nich. Bolton, perſonaliter coram Juſtic. predict. ad tempus et locum appunctuat. pro aſſemblatione Juſtic. illorum: et ſi appareat Juſtic. predict. vel majori parti eorum ſupra examinationem quod predict. N. Bolton, ſit talis perſona ut prefertur, tunc predict. N. Bolton remittatur cuſtodiæ predict. J. Mahone, aliter exoneretur e cuſtodia per Juſticiarios predictos.

for a falſe Return; but upon Conſent, they might have directed an Iſſue to try, or fixed upon Referees, who are a Jury of the Party's own chooſing, to try whether he was within the Act or not: it is nothing more than if the Parties, upon a Return to a Mandamus, ſhould agree to refer the Fact to Referees, inſtead of going to Trial by a Jury: it is ſo far from proving, that the Court could try the queſtion by Affidavits, it proves that they could not; and that inference is ſtrengthened by ſeeing no traces of ſuch an examination. There is no mention of it in any books of that time; and it is not to be conceived that it ſhould by accident have happened, that all the men, remanded upon good Returns, had no Evidence, and that all the perſons diſcharged, had.

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I am clearly of Opinion that Judges are not bound down by any Facts ſet forth on a Return, if diſproved by a Verdict; but that the Court can look at no other Proof, as to any Facts averred on a Return, admitting and juſtifying the Impriſonment.

The other Judges delivered their Opinions "ſeriatim" on the ſame Queſtions, the 25th, 26th, and 30th May 1758; and on the 2d June,

It was ORDERED, That the Bill, intituled, "An Act for giving "a more ſpeedy Remedy to the Subject upon the Writ of Habeas "Corpus," be

REJECTED *(a)*.

(a) Lords Journals, 29th Vol. p. 353.

ALLEN EVANS, Esquire, - - - - - - - - - - - - - - -
AGAINST } In Error.
Sir THOMAS HARRISON, Knight, Chamberlain of London,

COMMISSION OF ERRORS.

In the COURT of SAINT MARTIN-LE-GRAND.

Sir Thomas Parker, Knight,
Sir Michael Foster, Knight,
The Honourable Henry Bathurst, and
Sir John Eardley Wilmot, Knight,

Judges appointed by a Special Commiſſion of Errors, to inſpect the Judgment of the Sheriff's Court, and the Affirmance thereof in the Court of Huſtings, at the Guildhall of the City of London; and if there ſhould be any Error therein, to correct the ſame.

Sir John Eardley Wilmot.

5th July 1762. Evans, againſt Harriſon.

This Cauſe comes before this Court, by a Writ of Error brought by the Defendant in the original Action, to reverſe a Judgment in the Court of Huſtings, affirming a Judgment given in the Sheriff's Court againſt him, for the Sum of Six Hundred Pounds, ſuppoſed to have

have been forfeited by him, for the breach of a Bye-Law made by the City of London. Evans againſt Harriſon.

And the Declaration ſtates, that the City of London is and immemorially hath been an ancient City and County of itſelf, and that the County of Middleſex immemorially hath been and is an ancient County.

That the citizens of the ſaid City are, and immemorially have been, a Body Corporate under different names; but now are, and at the time of making the Bye-Law afterwards mentioned, were incorporated by the name of the Mayor and Commonalty and Citizens of the City of London.

That the Sheriffalties of the City of London and County of Middleſex are and immemorially have been ancient Offices, and that within the City of London, there now are and immemorially have been two Sheriffs of the City of London, annually elected, choſen, and appointed, which ſaid two Sheriffs jointly are and conſtitute, and for three hundred years and more before the making the Bye-Law afterwards mentioned, were and conſtituted one Sheriff of the County of Middleſex, and have as well exerciſed the Office of Sheriffs of the City of London, as the Office of Sheriff of the County of Middleſex.

That by a Bye-Law made in the Common Council of the City, the 7th April, 21 George II. it was Ordained, that the right of electing to the Office of Sheriffalty ſhould be veſted in the Liverymen of the ſeveral Companies of the City, to be aſſembled at the Common Hall of the City, held in Guildhall, and that the general day of Election ſhould be the 24th day of June; and if any perſon or perſons elected ſhould refuſe to conform to the Bye-Law, or die, or be removed, or there ſhould be cauſe upon any other occaſion to proceed

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to a new Election, then it ſhould be lawful for the Liverymen to proceed to ſuch new Election, at ſuch day and time as ſhould be appointed by the Court of the Lord Mayor and Aldermen. And it was Ordained, that every perſon elected, either upon the general Election day, or between the general Election day, and the 22d day of September following, when there ſhould be no actual vacancy in the Office, ſhould take the ſame upon him on the Vigil of Saint Michael the Archangel next following his Election, and hold the ſame for one whole year from thence next enſuing.

And it was thereby further Ordained, that from thenceforth it ſhould be lawful for the Lord Mayor, between the 14th day of April and the 14th day of June in every year, to nominate in the Court of the Lord Mayor and Aldermen, one or more fit and able perſon or perſons, not exceeding nine, being free of the City, to be put in Nomination for the Office of Sheriffalty, to the Liverymen to be aſſembled for the Election; and the perſon or perſons, ſo nominated by the Lord Mayor, ſhould be put in Nomination to the Liverymen until they ſhould be elected or diſcharged from ſuch Nomination; and if any perſon ſo nominated by the Lord Mayor ſhould, within ſix days after notice thereof, pay to the Chamberlain of the City £. 400. and twenty Marks, for the maintenance of the Miniſters of the ſeveral priſons within the City, then ſuch perſon ſhould be diſcharged from ſuch Nomination, and from ſerving the Office of Sheriffalty, unleſs he ſhould afterwards take upon him the Office of an Alderman; and no freeman of the City, nominated or elected to the ſaid Offices, was to be diſcharged from ſuch Election or Nomination for inſufficiency of wealth, unleſs he ſhould take his corporal Oath before the Court of the Lord Mayor and Aldermen, that he was not

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of the value of fifteen thouſand pounds, and unleſs ſix other freemen, to be approved of by the Court, ſhould, upon their Oaths, atteſt their belief of the truth of what he ſwore.

And it was thereby further Ordained, that every perſon elected to the ſaid Offices, either upon the general Election day, or between that day and the fourteenth of September, when there ſhould be no actual vacancy in the Office, ſhould perſonally appear before the Court of the Lord Mayor and Aldermen, at the firſt Court after notice of his Election, and ſhould then and there become bound to the Chamberlain of the City, by his Bond in the ſum of £.1,000. conditioned for his appearing on the Vigil of St. Michael the Archangel, then next following, between twelve and three, at Guildhall, where the Court of Huſtings is holden, and then and there taking the Oath of Office, uſually taken by the Sheriffs of the City and County of Middleſex, upon pain that every perſon that ſhould not appear and become bound as hereinbefore is mentioned, ſhould (if an Alderman or Commoner previouſly nominated by the Lord Mayor) forfeit and pay, to the uſes mentioned in the Bye-Law, ſix hundred pounds, or if not an Alderman or Commoner ſo nominated by the Lord Mayor, four hundred pounds; and every perſon who had paid any ſum of Money to the Chamberlain for the uſe of the City, to be exempted from the ſaid Offices, ſhould be for ever exempted, unleſs he ſhould afterwards become an Alderman, and no perſon who had ſerved the ſaid Office once, was to be choſen a ſecond time.

And it was further Ordained, that the Penalties to be forfeited by virtue of this Bye-Law, ſhould be recovered by action of Debt, in the name of the Chamberlain, in one of the King's Courts of Record in the City.

The

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The Declaration then ſtates, that on the 30th April 1751, FRANCIS COCKAYNE, Eſquire, then Lord Mayor, did, in the Court of Lord Mayor and Aldermen, duly nominate ALLEN EVANS, being a Commoner, and free of the City, and "a fit and able perſon," to be put in Nomination for the Office of Sheriffalty, to the Liverymen, to be thereafter aſſembled for the Election; of which Nomination the ſaid ALLEN EVANS the ſame day and year had due notice given him, but did not, within ſix days after ſuch notice given him, nor at any other time, pay the Chamberlain four hundred pounds.

That on the 24th of June 1754, and at every aſſembly of the Liverymen, aſſembled for the Election of Sheriffs after the Nomination of ALLEN EVANS, the ſaid ALLEN EVANS was duly put in Nomination to be elected one of the Sheriffs, but was not elected; and at an aſſembly of the Liverymen, held the 24th June 1754, for the Election of Sheriffs, GEORGE STREETFIELD and ALEXANDER SHEAFE were duly elected, but neglecting to appear and give ſuch Bond as was directed by the Bye-Law, the Court of the Lord Mayor and Aldermen did Order, that the Liverymen ſhould be ſummoned to aſſemble on the 23d July 1754, to proceed to a new Election of Sheriffs.

That at an aſſembly held the ſaid 23d July, ALLEN EVANS, being "a fit and able perſon," and free of the City, and not then diſcharged from the Nomination made of him by the Lord Mayor, nor otherwiſe exempted, was duly put in Nomination to the ſaid Liverymen, and the then Sheriffs did then and there declare as the truth was, that the Election of the Liverymen was then fallen on the ſaid ALLEN EVANS and JOHN TORRIANO, Eſquires; after which and upon the ſame day and year, at Guildhall, and in the place where the Court

Court of Huſtings was uſually holden, and in the preſence of the deputy of the Lord Mayor (then indiſpoſed) and ſix of the Aldermen, the ſaid ALLEN EVANS and JOHN TORRIANO were declared duly elected Sheriffs of the City, and Sheriff of the County of Middleſex, for the year then next enſuing, to commence from the Vigil of St. Michael the Archangel, and proclamation was then and there publicly made thereof, and the ſaid ALLEN EVANS and JOHN TORRIANO were called upon to come forth and give their conſent to the ſaid Office, but they did not give their conſent thereto. Evans againſt Harriſon.

The Declaration then ſtates, that the ſaid ALLEN EVANS had notice given him of his Election the 24th of July 1754, and that on the 30th of July 1754, the next Court of the Lord Mayor and Aldermen of the City, after the Election of the ſaid ALLEN EVANS, and the notice given him of ſuch Election, was held at Guildhall, where the ſaid ALLEN EVANS appeared and abſolutely refuſed to take upon himſelf the ſaid Office, without offering any reaſonable excuſe for his refuſal; and the ſaid ALLEN EVANS did then and there refuſe to become bound to the Chamberlain of the City by any Bond, with ſuch condition as is required by the ſaid Bye-Law, and the ſaid ALLEN EVANS refuſed to execute ſuch Bond, and take upon him the ſaid Office, not having taken his Oath in the Court of the Lord Mayor and Aldermen, that he was not of the value of fifteen thouſand pounds, and by reaſon thereof forfeited the ſum of ſix hundred pounds, which the Declaration charges, he has not paid, and for which the Action is brought.

To this Declaration the Defendant, ALLEN EVANS, has pleaded an Act of Parliament, made in 1661, intituled, "An Act for the well governing and regulating of Corporations," by which, after many temporary

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temporary proviſions not neceſſary to ſtate, it was enacted, " that no perſon or perſons ſhould be placed, elected, or choſen in or to any of the Offices or Places mentioned in the Act (compriſing the ſaid Office of Sheriff) that ſhould not have, within one year next before ſuch Election or Choice, taken the Sacrament of the Lord's Supper, according to the Rites of the Church of England; and that every ſuch perſon or perſons ſo placed, elected, or choſen, ſhould likewiſe take the three Oaths, and ſubſcribe the Declaration mentioned in the ſaid Act, at the ſame time when the Oath for the due execution of the ſaid Places and Offices reſpectively ſhould be adminiſtered; and in default thereof, every ſuch Placing, Election, and Choice, was and is by the ſaid Act enacted and declared to be void."

And the Defendant further pleaded another Act of Parliament, made in the firſt year of Will. and Mary, intituled, " An Act for exempting their Majeſties Proteſtant Subjects Diſſenting from the Church of England, from the Penalties of certain Laws;" ſetting forth, " that for as much as ſome eaſe to ſcrupulous conſciences in the exerciſe of Religion might be an effectual means to unite their ſaid Majeſties Proteſtant Subjects in intereſt and affection," it is enacted, " that ſeveral penal Laws (particularly mentioned in the Act) ſhould not extend to any perſon or perſons diſſenting from the Church of England, that ſhould take the Oaths and ſubſcribe the Declaration mentioned in the ſaid Act, before the Juſtices of the Peace at the general Seſſions of the Peace to be held for the County or Place where ſuch perſon ſhould live." The taking which ſaid Oaths, and ſubſcribing the Declaration, were to be regiſtered in the Court of Quarter Seſſions. And it was thereby further enacted, " that every perſon or perſons, who ſhould take the ſaid Oaths, and ſubſcribe the

ſaid

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ſaid Declaration, ſhould not be liable to the Penalties in two other Acts mentioned in the ſaid Plea; and all places of religious worſhip were to be open, and the Laws, provided for frequenting Divine Service on a Sunday, were to be enforced againſt all perſons, except ſuch perſons as ſhould come to ſome place of religious worſhip limited by that Act; and all places of religious worſhip were to be certified to the Biſhop, or Quarter Seſſions, or to the Juſtices at the General or Quarter Seſſions, and to be regiſtered in the Biſhop's Court, or to be recorded at the Quarter Seſſions.

The Plea then avers, that the two Sheriffs, on the 24th of September 1661, were, and from thence hitherto have been and ſtill are, perſons bearing an Office, Place, Truſt, and Employment relating to and concerning the Government of the City of London; and that the Defendant at the time of the ſuppoſed Election, was, and for the ſpace of fifty years and more then laſt paſt had been, and ever ſince hath been, and ſtill is, a Proteſtant Subject of this Realm, Diſſenting from the Church of England, and a perſon of a ſcrupulous Conſcience in the exerciſe of Religion; and during all that time hath frequented and ſtill doth frequent Divine Service on the Lord's Day, commonly called Sunday, and for that purpoſe during all that time hath come to, and ſtill doth come to ſome Congregation or Aſſembly of Religious Worſhip amongſt Proteſtant Diſſenters, from time to time during all that time, allowed and permitted by the ſaid Act.

The Plea then ſtates, that Allen Evans took the Oath and ſubſcribed the Declaration according to the directions of the ſaid Act, on the 21ſt May 1751, in the Seſſions held for the County of Middleſex, where he then lived; and that his taking the ſaid Oaths and ſubſcribing the ſaid Declaration, are duly regiſtered and recorded in

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the ſaid Court of Seſſions, and that he had not, one year before his Election, taken the Sacrament of the Lord's Supper, according to the Rites of the Church of England, nor has he ever taken, nor could he at any time in conſcience, take the ſame, nor was he in any ways bound by Law to take the ſame at any time ſince the 21ſt day of May 1751, of which premiſes the Court of the Lord Mayor and Aldermen held the 16th day of July 1754, and the Liverymen aſſembled the 23d of July 1754, and the Court of the Lord Mayor and Aldermen, held the 30th of July 1754, had Notice; and by reaſon thereof, and by force of the Act of Parliament "for the well governing and regulating of Corporations," the Liverymen, aſſembled on the 23d of July 1754, were prohibited from electing, and had no power to elect him to be one of the Sheriffs of the City, and he then was diſabled from and utterly incapable of being elected one of the ſaid Sheriffs, and the ſuppoſed Election of him was and is void.

To this Plea the Plaintiff hath replied, that by an Act of Parliament made in the 5th year of King George the Iſt. intituled, "An Act for quieting and eſtabliſhing Corporations," It was enacted, "that all and every of the then member and members of any Corporation within this Kingdom, and all and every perſon and perſons then in actual poſſeſſion of any Office," that were required by the therein recited Act, made in the 13th year of King Charles the IId. intituled, "An Act for well governing and regulating of Corporations" (in the ſaid Plea of the ſaid Allen Evans above-mentioned) to take the Sacrament of the Lord's Supper, according to the Rites of the Church of England, within one year next before his Election or Choice into ſuch Office, ſhould be and were thereby confirmed in their ſeveral and reſpective Offices and Places, notwithſtanding their

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omiſſion to take the Sacrament of the Lord's Supper as aforeſaid, and ſhould be indemnified, freed, and diſcharged of and from all Incapacities, Diſabilities, Forfeitures, and Penalties, ariſing from ſuch omiſſion, and that none of their acts, nor the acts not then avoided, of any who had been members of any Corporation, or in actual poſſeſſion of ſuch Offices, ſhould be queſtioned or avoided for or by reaſon of ſuch omiſſion; but that all Acts ſhould be and were thereby Declared and Enacted to be as good and effectual as if all and every ſuch perſon and perſons had taken the Sacrament of the Lord's Supper in manner as aforeſaid; nor ſhould any perſon or perſons who ſhould be thereafter placed, elected, or choſen in or to any the Offices aforeſaid, be removed by the Corporation, or otherwiſe proſecuted for or by reaſon of ſuch omiſſion, nor ſhould any Incapacity, Diſability, Forfeiture, or Penalty, be incurred by reaſon of the ſame, unleſs ſuch perſon ſhould be ſo removed, or ſuch Proſecution be commenced within ſix months after ſuch perſon's being placed or elected into his reſpective Office as aforeſaid.

To this Replication the Defendant has demurred, and the Plaintiff has joined in Demurrer.

Judgment was given for the Plaintiff in the Sheriffs Court, and a writ of Error being brought in the Court of Huſtings, the Judgment was there Affirmed; and it now comes before this Court by a Writ of Error, and the Plaintiff in the original Action having pleaded "in nullo eſt erratum," the Cauſe has been now argued three times, and ſtands for the Judgment of this Court.

There are two general Queſtions:

The 1ſt. is, Whether the Declaration is not inſufficient, becauſe it does not ſtate that the City has any right, either by Charter or Preſcription,

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ſcription, to elect the Sheriffs; that the Bye-Law being made to regulate this Franchiſe, it ought to appear upon the Declaration that they are entitled to the Franchiſe, which can only be by Charter or Preſcription; but as this Cauſe has been long depending, and the great Queſtion in it has been much agitated, and it is high time that it ſhould be ſettled, we have been very deſirous to determine this Cauſe upon its real merits; and, as we are all of the ſame Opinion upon the merits, and are deſirous that our Judgment ſhould be conſidered as founded upon the merits only, unmixed with any other ingredient whatſoever, we ſhall not give any opinion upon this Objection to the frame of the Declaration; ſo far I will ſay, that I think there is great weight in the Objection, and I am perſuaded the City will not be adviſed to adopt this Declaration as a Precedent.

The 2d, which is the great Queſtion in this Cauſe, is, Whether the Plaintiff in the original Action, under all the circumſtances diſcloſed by the Pleadings, is entitled to recover the Penalty of £. 600, impoſed upon the Defendant, for refuſing to comply with that part of the Bye-Law, ſtated in the Declaration, which directs that every perſon elected to the Office of Sheriff, ſhall appear before the Court of the Lord Mayor and Aldermen, at the firſt Court after notice of his Election, and become bound for his appearing and taking the Oath of Office upon the Vigil of St. Michael then next following: And I am of Opinion, that the Plaintiff is not entitled to recover, and that the Judgments, which have been given in this Caſe, ought to be reverſed.

This Caſe has been very ably and learnedly argued at the Bar, and ſeveral poſitions laid down, which are clear and indiſputable.

1ſt.—It is clear that, of common right, there is a power inherent in all Corporations to call upon their members for the performance of all corporate Duties.

2d.—That

2d.—That the execution of Offices is one of thoſe Duties.

3d.—That the Power of making Bye-Laws is incident to every Corporation.

4th.—That a Bye-Law, impoſing a reaſonable Fine for the refuſal of a corporate Office, is a good Bye-Law.

The Counſel have differed a little in their notion of the nature and quality of this Fine: the Counſel on one ſide call it a Puniſhment, and thoſe on the other ſide a Satisfaction by way of Damages. I think it rather participates of Puniſhment than of Satisfaction. In reſpect of the Corporator, it is certainly a Puniſhment, for the violation of a Law which he hath contracted to obey: for the right which every Corporation has to command their members, and the correſpondent obligation which their members are under to obey, ariſe from the Contract which they virtually make with the Corporation upon their admiſſion into it.

The Corporation ſtands with regard to Penalties, for the breach of Bye-Laws, in the ſame ſituation as the King does with reſpect to Penalties for the infraction of Acts of Parliament, "creditor pœnæ," as he is called in 1 Raym. 213.

There is another poſition which I take to be equally clear with any of the former; and that is, that the right which every Corporation has of calling upon their members to execute corporate Offices, may be abridged either by themſelves, or by the general Law of the land; and that brings this point to its true criterion, whether that right hath not been abridged in the preſent Caſe, and what will be the legal conſequence of ſuch an Abridgment.

The unhappy ſituation which the Royal Family and the Nation had been in for many years before the Reſtoration, made the Legiſlature

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lature very anxious to guard againſt relapſes; and as a very large portion of Government is delegated to Corporations, they thought it would be neceſſary, not only to rectify the irregular and arbitrary acts which had been done in garbling Corporations, by removing ſome Officers and placing others, but alſo to provide a proper ſucceſſion of Officers in Corporations for the future.

The manner of purifying Corporations, as they then ſtood, was by veſting an arbitrary Power in Commiſſioners to turn out whom they pleaſed for a limited time, to the 25th March 1663; and the only Teſt required of perſons who then were in Office, or who might come into Office within that limited time, was taking the Oaths and ſubſcribing the Declaration; and they did not require any Sacramental Qualification, becauſe whilſt the extraordinary power given to the Commiſſioners ſubſiſted, there was no occaſion for any other check or controul: but when that Commiſſion determined, and they were to provide for the ſucceſſion to Offices in perpetuity, then they did not reſt upon the Oaths and Declaration, but meaſured the fitneſs of the man by his antecedent religious habit, and laid down the rule by which that religious habit was to be examined and determined; and that was, his having received the Sacrament according to the Rites of the Church of England, within one year before his Election. They did not propoſe the Sacrament as a Teſt to be given at or after the Election; they durſt not truſt to that ſecurity, becauſe they thought the charms of Power, in poſſeſſion, might induce people to give this outward and viſible mark of converſion, without being really converted: they were afraid a ſudden converſion, under ſuch a temptation, might not be a ſincere one; and therefore they guarded their favourite point by a very different proviſion, by requiring

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ing that the party ſhould have received the Sacrament, according to the Rites of the Church, within one year before his Election: not by letting him into the Office, and turning him out again, becauſe he would not receive the Sacrament; but by ſhutting the door againſt him and never letting him in at all, if he had not received the Sacrament before his Election.

And the intention of the Legiſlature is expreſſed in the ſtrongeſt terms which the Engliſh language can afford, to effectuate ſuch an intention. The words are theſe, 13 Car. II. St. 2. C. 1. S. 12. "Provided alſo, and be it Enacted by the Authority aforeſaid, That "from and after the expiration of the ſaid Commiſſions, no perſon "or perſons ſhall for ever hereafter be placed, elected, or choſen in "or to any the Offices or Places aforeſaid, that ſhall not have, with-"in one Year next before ſuch Election or Choice, taken the Sa-"crament of the Lord's Supper, according to the Rites of the Church "of England; and that every ſuch perſon and perſons ſo placed, "elected, or choſen, ſhall likewiſe take the aforeſaid three Oaths, "and ſubſcribe the ſaid Declaration, at the ſame time, when the "Oath, for the due Execution of the ſaid Places and Offices re-"ſpectively, ſhall be adminiſtered; and in default hereof, every ſuch "placing, Election, and Choice, is hereby enacted and declared to "be void."

To whom is this Clauſe addreſſed? Not to the Party, but to the Electors: The prohibition is laid moſt clearly upon the perſons who had a right to elect. It is the voice of the Society, commanding them not to elect perſons who fall under that deſcription; and an Election made contrary to the Prohibition, is a tranſgreſſion of the Law;

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Law; and in this Caſe it was a wilful tranſgreſſion of the Law, becauſe it is expreſsly averred by the Plea, that the Lord Mayor and Aldermen, and the Electors, previous to the Election, had notice that Mr. Evans was one of the perſons who fell under the deſcription negatived by the Law; and if it was a wilful tranſgreſſion of the Law, it is a moral wrong which can never lay the foundation of an Action to be ſuſtained by a Court of Juſtice. Courts of Juſtice are inſtituted to enforce the will of the Society: the Laws manifeſt that will, and it is the duty of Courts of Juſtice, by Actions or Indictments, adapted to the nature of the Caſe, to carry thoſe Laws into execution; but they are not to ſuſtain Actions for refuſing to do what the Society had forbidden; it would be acting in direct oppoſition to the very deſign of their Inſtitution; it would be lending their aſſiſtance to contravene the will of the Society, inſtead of enforcing obedience to it.

The rule of the Common Law, in reſpect of Acts done contrary to the prohibition of the Law, is this, "quod contra legem fit, pro infecto habetur;" and the rule of the Roman Law, adopted by all the Laws in Europe, is, " ea quæ Lege fieri prohibentur, ſi fuerint facta, non ſolum inutilia, ſed pro infectis etiam habeantur; licet Legiſlator tantum fieri prohibuerit, nec ſpecialiter dixerit, inutile eſſe debere quod factum eſt;" and in this Caſe, the Law hath not only prohibited the Election of perſons, who have not received the Sacrament within the Year, but expreſsly declared the Election to be void.

It is a mere idol and ſhadow of an Election; and, as to all legal effects, exactly the ſame as if the Election had fallen upon an entire ſtranger to the Corporation. It is impoſſible to be under an obliga-

tion to obey, if the Party demanding obedience hath no right to command it. The Injunction not to elect, extinguiſhes the obligation to accept. Evans againſt Harriſon.

This is a legal conſequence, neceſſarily ſpringing out of a legal principle; and though the word "void" hath upon this occaſion, and upon many others, undergone very ſevere trials, and ſometimes hath been conſtrued to mean "voidable," and ſometimes "partially and relatively void," as to particular perſons, and for particular purpoſes; yet it muſt be conſtrued in its greateſt latitude and fulleſt extent, in reſpect of thoſe perſons who have done the act which the Law has forbidden.

An attempt was made to ſhew, that the Legiſlature intended a difference between the caſe of Officers, then in poſſeſſion and refuſing to take the Oaths and ſubſcribe the Declaration, and perſons who ſhould afterwards be elected, not having received the Sacrament within a Year before the Election: that, in the firſt Caſe, the Offices are declared to be "void to all intents and purpoſes, as if the ſaid reſpective perſons ſo refuſing were naturally dead;" but that in the latter Caſe, it is only ſaid, every ſuch Placing, Election, and Choice, is thereby enacted and declared to be "void." The omiſſion of the words, "to all intents and purpoſes, as if the perſons were dead," is urged as an evidence of taking a much wider compaſs in the one Caſe than in the other.

But I can find out no different intention, from this difference of expreſſion, as to the point now under conſideration: they intended in one caſe to turn perſons out of Power, who would not take the Oaths and ſubſcribe the Declaration; and in the other, to keep perſons out of Power, who were not of the eſtabliſhed Church. Their intention was the ſame, as to the point then under conſideration;

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and the difference of expreſſion is owing to a difference between the caſes of turning a man out of an Office which he had, and keeping a man out of an Office which he never had at all. The words are accommodated and adapted to the ſubject matter; where the Office was full, it declares the Office ſhall be void to all intents and purpoſes, as if ſuch perſon was dead: it was a civil corporate Death they were inflicting upon Officers then exiſting; but in the other Caſe, they were guarding againſt any ſuch exiſtence.

And it is very obſervable, that the Act doth not make the Office void, but the Election void; which proves decifively they did not apprehend the Office would be filled by ſuch an Election; if they had, they would have applied the annulling words to the Office, as they have done in the Caſe of Officers then in poſſeſſion, and not to the Election; and though it was proper, where the Office was full, to ſay, it ſhould be "void, as if the perſon refuſing the Oaths was dead;" yet it would have been very abſurd to have applied the ſame expreſſions to perſons whom they had enjoined the Corporation not to create, and moſt inaccurate to have illuſtrated their meaning by a reſemblance to the Election of a dead man. If they had thought any explanatory reſemblance neceſſary, it would rather have been, as if ſuch perſon had not been a Member of the Corporation, or as if ſuch Election had never been made; but it would have been uſeleſs tautology to have added any thing; for when it ſays the Election ſhall be void, it is in effect ſaying that it ſhall be conſidered by the Law as if there had been no Election at all.

It was ſaid, that the Law againſt Gaming makes Notes "void to all intents and purpoſes," and the Acts againſt Uſury only makes them "void;" and that a Gaming Note in the hands of an inno-

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cent Indorſee, would be void againſt the Drawer, but it would not be ſo in the Caſe of a Note given upon a uſurious Contract; and it was determined in the Caſe of a Gaming Note, that it would be void in the hands of an Indorſee; but if that Caſe is right, which was then thought a hard one, I think the Law muſt be the ſame upon a uſurious Note; and no Caſe was cited, either before or ſince the Caſe upon the Gaming Note, to eſtabliſh ſuch a diſtinction; and I am ſure I can find out none in the intention of the Legiſlature, between "void," and, "void to all intents and purpoſes." It is only an ampliation of expreſſion, and ſpreading out the ſame idea a little more diffuſively; but they both equally mean—That the Act done ſhall be conſidered as if it was not done. But it was then very ingeniouſly urged, that the Law will not endure ſuch a conſtruction of the word "void," and that this Election cannot be void to all intents and purpoſes whatſoever; becauſe a Warrant by a Sheriff, ſo choſen, would not ſubject the Plaintiff to an Action for falſe Impriſonment, and that a Bail Bond taken by ſuch a Sheriff, might be aſſigned, and the Bail might be ſued, if the principal did not appear according to the Bail Bond; and I admit the Law to be ſo; but it would be exactly the ſame if the Corporation had elected an entire ſtranger to the Corporation, or an Uſurper had been in poſſeſſion of the Office without any Election at all; for a Rule of Law interpoſes in this Caſe, viz. That the authority of a Magiſtrate or officer is not to be looked into by individuals ſubject to the Juriſdiction, nor any Inquiry made whether his Authority be lawful: Poſſeſſion alone, for Public Convenience, is ſufficient to ſubſtantiate all ſuch Acts as are eſſentially neceſſary for the Adminiſtration of Juſtice, and which Magiſ-

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trates and Officers " de jure" muſt and ought to perform: but for my own part, I lay very little ſtreſs upon the annulling part of this Clauſe; I think it is involved in the Prohibition: the principle upon which I go is, that the Election is an infraction of the Law; and right cannot ſpring out of wrong.

To analyſe the Caſe more particularly—Suppoſe an Act of Parliament were now to prohibit the Election of unmarried men into Corporation Offices; what would be the legal conſequence of ſuch a Prohibition? It would repeal all the Bye-Laws in England, as to the perſons included in ſuch Prohibition, and place them as effectually out of the reach of the Bye-Law, as if the Bye-Law itſelf had excepted them. It would extinguiſh their eligible capacity, and in reſpect of Corporation Offices, would entirely ſeparate them from the Corporation: it would work a Releaſe of the original Contract, as to ſuch perſons; for the Contract being to execute all Offices to which the party is duly elected, a due and valid Election is a Condition precedent to the exiſtence of the Right in the Corporation to command, and of the obligation in the Members to obey. And the preſent Bye-Law has ſome prohibitory Proviſions in it: It forbids the Election of any perſon who has either commuted for the Office, or executed it; and if the City were to elect, contrary to that Prohibition, would the Bye-Law ſupport them in an Action for refuſing to act under ſuch an Election? It would be making the Bye-Law contradict itſelf, and defeat one proviſion by another. And therefore, if the Clauſe in this Act of Parliament had been engrafted into the Bye-Law, it muſt have had the ſame effect as the Clauſe in the Bye-Law, prohibiting the Election of thoſe who had executed the Office,

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or commuted for it; and it would have had ſuch an effect, inſerted in the Bye-Law; " a fortiori," it muſt have the ſame effect in an Act of Parliament, which controuls all Bye-Laws whatſoever.

The motive of the Prohibition, or the quality which the Law requires or rejects in the party to be elected, will not influence the legal conſequences which follow the contravention of the Law: whether it be, not receiving the Sacrament, or not being married, the will of the Legiſlature is the ſame; and indeed a Non-conformiſt is not within the terms of the Bye-Law upon which this Action is brought; for the Legiſlature have ſaid a Non-conformiſt is not a fit perſon to be truſted. The Bye-Law confines the Nomination to fit perſons, therefore a Non-conformiſt is not an object of the Bye-Law; and if it had expreſsly named " Non-conformiſts," I ſhould have thought it void; becauſe it would have directly encountered the Law of the Land, which ſays, Non-conformiſts ſhall not be elected. It would have laid men under contradictory and inconſiſtent Obligations. If they obeyed the Bye-Law, and accepted the Office, they would have been Uſurpers upon the Crown, and open to a penalty of £. 500, for breaking the Law of the Land: If they obeyed the Law of the Land, and refuſed to accept the Office, they muſt have been liable to the Penalty of £. 400, for diſobeying the Bye-Law.

It has been ſaid, that this Act of Parliament was not made to eaſe Diſſenters, but to puniſh them; that exemption from burdenſome Offices will be an eaſe to them, and that they ought not to enjoy their Freedom at a leſs expence than the Members of the eſtabliſhed Church; that, " qui ſentit commodum ſentire debet et onus:" That it will be giving the Act an effect which the Legiſlature did not intend

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intend it ſhould have, and that all Acts of Parliament muſt be conſtrued in ſuch a manner as not to encounter the intention of the Legiſlature; that it would be moſt agreeable to that intention to conſtrue the Election abſolutely void as to the perſon holding the Office, and for his benefit, but good as to the Corporation, who call upon him for the Commutation.

And there certainly are many Caſes, as I have mentioned before, where the ſame Act is good to a certain degree, or for ſome certain purpoſe, or to ſome perſons, and "void" as to all others; but there never was a Caſe where that word was conſtrued in ſuch a manner as to make the Act good for the benefit of the perſon who had broke the Law, and void as to the perſon who had refuſed to concur in breaking it.

As to the Intention of the Act of Parliament; it was moſt certainly to ſecure and appropriate all the Power, which Corporation Offices give, to perſons who, at leaſt outwardly, profeſſed the Religion of the ſtate. That was the ſole end, object, and aim of this Clauſe in the Act of Parliament: it was a Bill of excluſion from Power: it did not look after or provide for the conſequences of that excluſion.

Whether thoſe conſequences would prove beneficial or detrimental to them, or whether upon the balance of the account, they would prove gainers or loſers by the excluſion, was not the point the Legiſlature had in view; their point only was, that perſons, who were not of the Religion of the State, ſhould not be entruſted with Offices under the State; "Nolumus res ſic adminiſtrari." The conſequence ariſing from this Law, was the excluſion of Non-conformiſts from Power, which is Puniſhment; but Puniſhment was not the end of

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the Law, but a conſequence of it; and in the expoſition of a Law, great care muſt be taken not to miſtake the conſequence of a Law for the end of it. Evans againſt Harriſon.

To attain the end of a Law, it is the duty of Judges to make an enlarged and liberal expoſition of it, and to hold all Caſes that are within the reaſon, to be within the reach of it; and therefore to appropriate all Corporation Offices to the members of the eſtabliſhed Church, and exclude Non-conformiſts, Judges ought to expound the Law with the ſame ſpirit which influenced the Legiſlature in making it.

But it is not to be conſidered or conſtrued as a vindictive Law, for any purpoſe whatſoever, which is not neceſſary to the attainment of its own end; and if this Law were to be conſtrued in ſuch a manner as, beſides the loſs of Power, which is the neceſſary conſequence of the Law, it ſhould alſo expoſe them to a Penalty for having loſt it, it would be confounding the end of the Law with the conſequence, and making it operate as a vindictive Law for tranſgreſſion; whereas it was intended as a Law to direct by whom the Powers of Government ſhould be adminiſtered in Corporations, and as a Palladium to the Conſtitution in Church and State.

Whether this Caſe did occur to the Legiſlature, or how they would have thought it ought to be determined, is a matter of mere conjecture.

The Act itſelf plays no light upon it: it does not fall within the line of view which the eye of the Legiſlature was then upon: different men may, very plauſibly, make different conjectures as to the will of the Legiſlature upon this Queſtion; but arbitrary conjecture ought never to be the baſis of Judicial Determinations. It would be removing

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moving the great boundary between Judicial and Legiſlative Authority. If the Caſe did occur to the Legiſlature, and they had intended to make any difference between lucrative and burdenſome Offices, they would moſt certainly have inſerted a Proviſion in the Law for that purpoſe; but by making no diſtinction between them, they muſt have intended that the Rules of Law ſhould act equally upon both, and the conſtruction muſt now be the ſame as to both: and ſuppoſe the Queſtion put to the Legiſlature upon a lucrative Office, for inſtance, the Office of Chamberlain or Town Clerk, in this manner; "A Bye-Law ſubjects a Citizen, who refuſes to execute this Office, to a Penalty of £.400. Do you then intend, by diſabling a Non-conformiſt from being eligible to this Office, to leave him open to a Penalty for not accepting it?" What muſt the Anſwer have been? "We intend to keep Non-conformiſts out of Power; and for that purpoſe we command the Corporation not to elect them. They can never be open to a Penalty for not accepting an Office to which they are never to be elected."

Suppoſe it was then ſaid, "but the Corporation may perhaps elect them; and if they do, they cannot ſay they are not qualified, becauſe it is an Offence, not to be qualified." If that argument had any weight with them, muſt not the Anſwer have been, "We do not intend to exclude them from Power and Profit, and at the ſame time leave them liable to Puniſhment for being excluded."

But ſuppoſe the Queſtion put upon a burdenſome Office, and the ſame argument made uſe of as has been urged in this Caſe, "qui ſentit commodum, ſentire debet et onus;" and it had been ſaid, that they ought not to enjoy their freedom at £.400 leſs expence than the members of the eſtabliſhed Church.

Is

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Is not the Anſwer a very obvious one? The Exemption from both makes them both equal. If they were exempted from burdenſome Offices only, and not from lucrative ones, there would be an inequality; but if they are excluded from both, the Rule of "qui ſentit commodum, ſentire debet et onus," applies directly the other way: for if the members of the eſtabliſhed Church are to have all the lucrative Offices, they ought alſo to take all the burdenſome ones; and though a Non-conformiſt in that Caſe pays leſs for the enjoyment of his freedom by ſuch an excluſion, the members of the eſtabliſhed Church get ſo much more, and all the power of Government into the bargain; and upon the balance of the whole Account, the inequality produced by the excluſion, is in favour of the eſtabliſhed Church: for beſides the home-felt joy which every good man feels from ſerving his King and his Country, even in the popular eſtimate of valuable acquiſitions, Power is to many the moſt valuable acquiſition; to all it is of ſome value; and riches themſelves are often coveted only as the means of acquiring Power, and of diſtinguiſhing their poſſeſſors in the Government. And as to Conformity to get a lucrative Office, and Non-conformity to avoid a burdenſome one, I do not ſee how ſuch a Caſe can exiſt: for if they are qualified to accept a lucrative Office, they are equally qualified to be charged with a burdenſome one. But if the proſpect of a profit to come produces Conformity, as it often does, it only ſhews the nature of the ſcruple in the individual conforming—an unreal mockery in him; it does not prove that the ſcruples of all other Diſſenters are equally fictitious and imaginary; and it is as unjuſt to meaſure the whole Claſs of Diſſenters by the conduct of ſome of their members, as it would be for them to judge of the Religion of the eſtabliſhed Church by the Lives

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and Practices of ſome who profeſs it: and though it has been ſaid, they can have no ſcruple of Conſcience in paying the £. 400, whatever ſcruple they may have about receiving the Sacrament; it is not a ſcruple of Conſcience which produces this Refuſal to pay the £. 400, but an apprehenſion that they ought not to be fined for not accepting an Office to which they are not elected.

But if this Law was to be conſidered as a Law made to puniſh Non-conformiſts, in the proper ſenſe and meaning of the word "Puniſhment," which is the evil of ſuffering for antecedent tranſgreſſion; it muſt then be conſtrued ſtrictly, and if any doubt ariſe upon the extent of it, the turn of the ſcale muſt be in favour of the Delinquent; whereas the conſtruction now contended for, is to add an additional Puniſhment to what the old penal Laws inflicted, and to the loſs of Power, which is the neceſſary conſequence of this Law: for however the point may be involved in words and expreſſions, it is in reality making this Law operate in ſuch a manner, as to ſubject Non-conformiſts to an additional penalty of £. 400 for not having received the Sacrament.

Another Argument has been urged, that it is againſt a maxim of Law, that a man ſhould diſable himſelf, and eſpecially when that diſability ariſes from the Omiſſion of a Duty which the Law enjoins; that it is not a Defence, but an aggravation of his Offence: that according to the ſound conſtruction of the Toleration Act, Diſſenters were not intended to be exempted by it from any ſecular Duties, but only to be delivered from the Penalties which ſeveral Laws had ſubjected them to for not complying with ſome Religious Duties; and the inſtances of perſons, who are out of their ſenſes, not being ſuffered to avoid their own acts, by pleading their own diſability, are

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mentioned in ſupport of that Rule. And if a natural diſability, which is the act of God, is no Defence, "a fortiori," it is ſaid, a diſability ariſing from an Offence ought not to prevail.

1ſt. I deny the Rule in the latitude and extent it is laid down; for all Pleas of Infancy and Coverture are Pleas by which Parties diſable themſelves. And even in the Caſes of Inſanity, if Inſanity appears upon a general Iſſue pleaded, the Law will excuſe them. And ſo it is laid down by Holt, in Skinner, 576. Fitzherbert was of a different opinion as to the Rule itſelf; and it does ſeem to be very unaccountable, that a man ſhould be at liberty to avoid his own Act, by the Dureſs of Man, and not by the Dureſs of Heaven; and the reaſon given for it in the Books, that a man cannot know what he did when he was mad, is to me quite unintelligible; for what inconſiſtency is there in ſaying, he does not know he ever did ſuch an act; but if he did, he was mad when he did it?

The beſt and the trueſt reaſon ſeems to be, that the Law has directed a particular mode of Inquiry for the manifeſtation of Inſanity, and avoiding the acts of perſons under that unhappy viſitation. The King, as the general Curator of all ſuch perſons, is to take them under his immediate protection, and after an Office, finding the Inſanity, to avoid ſuch of their acts as he thinks proper. But in all caſes of Puniſhment, properly ſo called, Inſanity is always a Defence; and if a Lunatic were to be elected into a Corporation Office, he might certainly be defended againſt an Action for not accepting the Office by his Inſanity; for it would be only ſhewing that he is not the object of the Bye-Law; and in 5 Mod. 421. it is expreſsly laid down, that Madmen cannot be choſen into Corporation Offices, but are tacitly excepted out of all Bye-Laws made to oblige an acceptance

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of them. So in this Caſe, when the Party ſhews that he has not received the Sacrament, he ſhews that he is not a fit perſon to be elected, and conſequently not an object of the Bye-Law. The only difference between the Caſes is, that he ſhews a natural Incapacity in the one Caſe, and a legal Incapacity in the other: and even in the Caſe of Lunatics, avoiding their own Acts, Lord King, Equity Caſes Abridged, 279. was of opinion, that the Rule was to be underſtood, of Acts done by them to the prejudice of themſelves. A Caſe was put upon a Purchace by a Papiſt, which is void; and yet, if he were in poſſeſſion of the Eſtate, it is aſked, could he plead this Diſability if called upon to execute an Office in reſpect of the Tenure? And he certainly could not, becauſe the Service follows the poſſeſſion, and is a lien upon the Eſtate. It is a condition which follows the Land, let it be in whoſe hands it will, and the Law looked on the perſon in poſſeſſion; and whether he is in by title or without title, the eſtate muſt perform the ſervice by the perſon who then has it.

But then, it is ſaid, the circumſtance which renders the Party incapable of being elected, is an Offence; it is the omiſſion of a Duty enjoined both by the Temporal and Eccleſiaſtical Law, and a perſon ſhall not avail himſelf of a Tranſgreſſion of the Law, to releaſe himſelf from the performance of his own Contract.

The fallacy of this Argument lies in not fixing what this Contract is: the nature and extent of the Contract muſt be ſettled with preciſion, before we can apply any Rule of Pleading, laid down by the Law, for avoiding it.

Now, what is the Contract?——It is a Contract to execute all Offices to which the Corporation duly elects him; and therefore, when he pleads a Fact, which ſhews that he is not elected, it is not

a Plea

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a Plea to avoid his Contract, but it is a Plea of a Fact, ſhewing that he has not broken it.

In the Caſe of Inſanity, the Plea would avoid the Contract, from the Incapacity of the party to make it. This Plea admits the validity of the Contract, but denies the infringement of it. It is diſcloſing a Fact which ſhews that he is not elected: it is an objection to the Plaintiff's right of action. And the firſt thing to be conſidered in all Actions, is the Plaintiff's Title. If there is any radical defect in his Title, it is the province of the Judge to diſmiſs it out of Court, even though no objection was made to it by the Defendant; and there are many Caſes founded upon that principle. If it appears the Plaintiff has broken the Law, he ſhall never have the benefit of the Law in the very Inſtance in which he has broken it; and though the Defendant may have broken the Law too, yet that will not repel the objection to Plaintiff's right of Action.

But ſuppoſing a perſon ſhall not diſqualify himſelf by an Offence, yet, ſince the Toleration Act, where is the Offence in perſons who bring themſelves within the deſcription of that Act? For that Act hath taken away both "reatum et pœnam."

But it is then ſaid, that the Toleration Act was not made to releaſe Diſſenters from any ſecular Duties, but to exempt them only from Penalties. And the 7th Sect. in the Toleration Act has been much relied upon, to ſhew, that a diſcharge from temporal Offices was then under their conſideration; and that it can be carried no further than to the Offices there ſpecified, and that it is not an abſolute exemption even from them, but only enables the Parties to find a Deputy; for if that Deputy is not approved, they are ſtill liable; and it has been very ingeniouſly urged, that this is an evidence the Act did not intend to

meddle

Evans againſt Harriſon.

meddle with any temporal Offices but what are mentioned in that Section, and with thoſe, only for the purpoſes particularly mentioned in it.

1. Now in the firſt place, that Clauſe does not relate to any Offices which require a Sacramental Qualification; and therefore it does not prove that thoſe Offices were then under their conſideration.

2. In the next place, that Clauſe is moſt apparently adapted to the Caſe of perſons who did not care to take any Oaths at all, viz. to the caſe of Quakers. It was a ray of indulgence to them, guarding at the ſame time againſt that indulgence being prejudicial or injurious to other people.

But the true uſe and influence of the Toleration Act upon this Queſtion is, that by extinguiſhing the Offence, it extinguiſhes the reaſon upon which Lord Chief Juſtice Holt founded his Opinion in the Caſe of the King and Larwood. It is a neceſſary conſequence, reſulting from the Repeal of thoſe Laws which created the Offence.

It does not, "ex profeſſo," interfere with Sacramental Offices, or perhaps intentionally; but when it aboliſhes the Offence, it removes the Objection, and puts the perſons, who bring themſelves within the deſcription of the Act, into the ſame ſituation as if thoſe Laws had never exiſted; and if they do not exiſt, it is no greater Offence in them not to have received the Sacrament, than not to be worth £. 15,000. The Election was illegal and void, but the Parties were eſtopped from ſhewing the Defect, becauſe that Defect was an Offence in the perſon who ſhewed it; but when it ceaſes to be an Offence, the Eſtoppel vaniſhes, and the argument upon this Objection ſtands thus: The not receiving the Sacrament was an Offence, and when it was an Offence, a perſon could not excuſe himſelf from paying the

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the Penalty of the Bye-Law, by alledging that he had been guilty of it; but the not receiving the Sacrament by perſons within the deſcription of the Toleration Act, is now no tranſgreſſion of the Law; and if it is no tranſgreſſion of the Law, it is no Offence; and if it is no Offence, it is no more than ſhewing any other Fact which renders the Party elected not eligible. And this diſtinction varies the Caſe of Diſſenters, bringing themſelves under the deſcription in the Toleration Act, from the Caſe of Atheiſts, Infidels, and perſons who are of no Religion at all. And if the Law had ſaid, that no unmarried man ſhould be elected into this Office, there is not the leaſt colour to ſay that an unmarried man, elected, might not have repelled this Action, by a diſcloſure of the want of that Qualification.

As to the Amendment made by the Lords to the Occaſional Conformity Bill, and the Conference upon it in 1702; both the Bill and the Conference proceeded from a Factious Party Spirit in both Houſes, when Queſtions were ſtarted and toſſed about from one ſide to the other, without conſidering the relevancy of them, but only how far they would annoy and perplex one another: and if it had been the reſult of the cooleſt and moſt mature deliberation, it only manifeſts the apprehenſions of the Houſes at that time, which were probably occaſioned by the Caſe of the King and Larwood: but Parliamentary Doubts, Debates, or Conferences, ought to have no weight in directing Judicial Determinations.

As to the 5th Geo. I. it is made uſe of only to ſhew, that an Election of a perſon who has not received the Sacrament, cannot now be conſidered to be abſolutely void to all intents and purpoſes whatſoever, becauſe a poſſeſſion for ſix months will ſubſtantiate it. But that Act only affects Caſes where there has been ſix months Poſſeſſion,

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ſion, and is rather a Statute of Limitations, founded upon Public Convenience, to guard againſt the violent operation of the annulling words in the Corporation Act.

But before the ſix Months are expired, and even afterwards, where there has been no poſſeſſion of the Office under ſuch an Election, the operation of the former Law is not at all varied by it.

I ſhall be very ſhort upon the Caſes which have been cited, becauſe I have in ſome part or other of what I have ſaid, endeavoured to meet all the reaſons that are to be found in any of them.

The Caſe of Box and Wollaſton, is cited as an Authority for the Defendant in Error; but that Caſe could not have been determined for the Plaintiff, upon the point which it is now produced to prove; becauſe if it had, it muſt have been cited and relied upon by Lord Chief Juſtice Holt, and Sir Giles Eyre, as a Caſe directly in point to ſupport their Opinion. The Court therefore certainly expreſſed their ſentiments in favour of the Plaintiff upon the merits, but determined againſt him upon ſome imperfection in the Form of the Replication. But if it had been determined upon the merits, ſtill it proceeds upon the principle of not diſqualifying by an Offence; and therefore does not apply to the preſent Caſe, where the Fact alledged is now no offence.

The King and Larwood is certainly no Authority in the preſent Caſe, becauſe from all the Reports of it, it is clear the Toleration Act was laid quite out of that Caſe by Lord Chief Juſtice Holt; and it was the Opinion only of two Judges, Mr. Juſtice Samuel Eyre being of a different Opinion. And in 4 Mod. 274. Lord Keeper, Lord Sommers, is ſaid to have been of the ſame Opinion with Mr. Juſtice Samuel Eyre; and it is obſervable from the ſame Book, that the

the Fine ſet upon the Defendant Larwood, in that Caſe, was five marks and no more, which ſhews that the two Judges who were of Opinion againſt him, thought it a tender Caſe, and were very gentle in the Puniſhment. Evans againſt Harriſon.

But giving that Caſe all the Authority which the unanimous Opinion of a Court deſerves, yet as it ſtands upon a reaſon which vaniſhes, like a phantom, before the Toleration Act, it can have no effect upon the preſent Queſtion, except it be in favour of our Opinion—For that Caſe does in effect prove, that if it had not been an Offence, advantage might have been taken of the Diſability. And I obſerve, that it is admitted in that Caſe by the Judges who were of Opinion againſt Larwood, that if one is diſabled by Judgment to bear an Office, he ſhall be excuſed, "quia judicium redditur in invitum." If a Judgment againſt an individual will excuſe, why ſhall not an Act of Parliament, which is the ſupreme Judgment of the whole Legiſlature, have the ſame effect?

The Caſe of the Mayor of Guildford and Clarke, 2 Vent. 247. is an Authority againſt the King and Larwood. And though the Court in that Caſe thought the Exceptions to the Declaration incurable, and the Book ſays, that ſo Judgment was given for the Defendant; yet they were unanimouſly of Opinion, that the Plea in that Caſe was a good Bar.

As to the Caſe of Sir John Read, 2 Mod. 299. He was capable of the Office at the time he was appointed to it, and had been actually in the poſſeſſion of it for three Months; whereas the Defendant in this Caſe was not eligible into the Office at all, and never was in the poſſeſſion of it.

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Sir John Read was alledging a Diſability, which he had not only Power to remove, but it was his Duty to remove; but when a Non-conformiſt is elected into a Corporation Office, he cannot remove the Diſability, becauſe it is a Diſability which precedes the Election; and his receiving the Sacrament afterwards will not remove it, and ſince the Toleration Act, it is not his Duty to remove it if he could.

The Caſe of the Mayor of Exeter and Starr, 3 Lev. 116. doth not relate to the Sacramental Qualification. Starr refuſed to take the Oaths and ſubſcribe the Declaration according to the Corporation Act; and they held that a refuſal of the Oaths was a refuſal of the Office, and ſo within the Power given to them by their Charter to fine for refuſing to accept of Offices; but there was no Incapacity to be elected ſuggeſted, and therefore that Caſe differs as widely from this Caſe, as being legally elected and illegally elected, differ from one another.

If it be thought juſt and reaſonable that this Claſs of Men ſhould pay £. 400 a piece, for not executing Offices which they are forbidden to accept, the Law muſt be altered by the Legiſlature; for as the Law now ſtands, I am clearly of Opinion they are not obliged to pay it, and that the Judgment in this Caſe ought to be,

REVERSED *(a)*.

(a) The Judges, Commiſſioners of Error, were unanimous in Reverſing the Judgment of the Sheriffs Court, and the Affirmance thereof by the Court of Huſtings.

A Writ of Error in Parliament was brought in 1766, for the Reverſal of this Judgment of the Commiſſioners of Errors; and, on the 4th of February 1767, after hearing the Opinion of the Judges "ſeriatim," on a Queſtion of Law propoſed to them, the above Judgment of Reverſal was

AFFIRMED.

V. Journals of the Houſe of Lords, Vol. 31. p. 475.

APPEAL,

Before the moſt Reverend Father in God THOMAS, by Divine Providence ARCHBISHOP of CANTERBURY, Primate and Metropolitan, &c. VISITOR in ordinary and Interpreter of the Statutes of the College of ALL SOULS departed this Life in the Faith, in the Univerſity of OXFORD: The Honourable Sir JOHN EARDLEY WILMOT, Knight, one of the Juſtices of the Court of King's Bench; and, The Worſhipful GEORGE HAY, Doctor of Laws, Vicar General of his ſaid Grace:—Sitting as his Aſſeſſors in Doctors Commons, London; preſent EDWARD RUSHWORTH, the Actuary aſſumed.

WOOLLEY LEIGH SPENCER,

AGAINST

The WARDEN and FELLOWS of ALL SOULS COLLEGE, OXFORD.

THIS Cauſe was aſſigned to be heard this day at the Petition of the Proctors on both ſides: Greene prayed that his Grace would pronounce for the Appeal made and interpoſed in this behalf, and that the pretended Election of WILLIAM VYSE and JAMES POOLE, in this Cauſe appealed from, was and is null and invalid in Law, and that it may be ſo pronounced, and that the Warden and Fellows of the ſaid College may be moniſhed and compelled to admit the ſaid WOOLLEY LEIGH SPENCER, a true and actual Fellow of the ſaid

20th February 1762. Spencer againſt All Souls College.

Spencer againſt All Souls College.

College, as a Founder's Kinſman, and of the Blood, Kindred, or Lineage of the Founder, Archbiſhop Chicheley, into one of the Fellowſhips vacant at the time of the ſaid pretended Election, within a competent time, to be fixed and aſſigned by his Grace, and to certify the ſame within ſome ſhort time after ſuch Admiſſion, and that the ſaid Warden and Fellows may be condemned in the Coſts of this Suit, and compelled to the due payment thereof. Stevens prayed that his Grace would be pleaſed to pronounce againſt the force and valididity of the Appeal interpoſed in this behalf, and would diſmiſs his Clients from the ſaid Appeal, and would condemn the ſaid Woolley Leigh Spencer in Coſts.

There were Two other Appeals, of

CARNE againſt the ſame.
WYNNE againſt the ſame.

THE Appellants had propoſed themſelves as Candidates at an Election for two vacant Fellowſhips of All Souls College. Wynne was in the eleventh, Carne was in the thirteenth, and Spencer in the fourteenth Degree from the Founder; and the College had rejected their Claims, admitting their Pedigrees and their Qualifications, but inſiſting that Conſanguinity was worn out at ſuch remote Degrees from the Founder, and that they were not entitled to any Preference. The Appellants founded their Claim upon the following Clauſes in the Statutes:

" Inſuper cum, ſecundum Apoſtolum, teneamur bonum facere ad " omnes, maxime ad domeſticos Fidei, Ordinamus & volumus quod " in omni Electione Scholarium predictorum, futuris temporibus in " dictum Collegium facienda, principaliter et ante omnes alios, illi

" qui

" qui ſunt vel erunt de Conſanguinitate noſtra & genere, ſi qui tales
" ſint, ubicunque fuerint oriundi, dum tamen ſint reperti habiles &
" idonei, ſecundum Conditiones ſuperius & inferius recitatas, ſine
" aliquo Probationis tempore, in veros dicti Collegii Socios ab initio
" eligantur & etiam admittantur: Quibus deficientibus, tunc illi qui
" ſunt vel erunt de Locis vel Parochiis in quibus Poſſeſſiones et Res
" ſpirituales ſive temporales dicti Collegii conſiſtant, &c.

Spencer againſt All Souls College.

" Quod omnes electos ſeu aſſumptos (his qui de noſtro Sanguine
" duntaxat exceptis) per unum Annum in eodem Collegio ſtare vo-
" lumus, antequam in veros Socios ejuſdem Collegii admittantur."

The Queſtion was argued by Mr. Blackſtone and Dr. Smallbrook, for the College, and by Dr. Wynne and Mr. Wynne, for the Appellants.

When the Audience was withdrawn (which Dr. Hay reported to be the Practice upon Appeals to Viſitors) the Archbiſhop having aſked Mr. Juſtice WILMOT his Opinion, he ſaid,

THAT he thought it was a Queſtion of Intention; and that if that Intention was not repugnant to Reaſon, Morality, or the municipal Laws of the Kingdom, it muſt be implicitly obeyed.

THAT a Founder was a Legiſlator in reſpect of the Society which he had created. The Statutes were a Code of Laws, by which the Society was to be governed, and the Succeſſion regulated; and that his Grace was ſubſtituted by the Founder, in the place of his Heirs, to be the Guardian of the Founder's Intention, and in this Domeſtic Forum, to enforce obedience to it: that the Founder's Intention was to be collected from his words, and that he had himſelf laid down the Rule for expounding them, " ſecundum verum literalem et gramma-
" ticalem ſenſum," and that the words " de conſanguinitate genere
" & ſan-

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" & ſanguine," were as general, comprehenſive, and indefinite as could be found in the Latin Language, to take in all perſons whatſoever, who were of the ſame Blood with the Founder, to the remoteſt generation.

That it was a Rule adopted by all Laws, " quoties in verbis nulla eſt ambiguitas, expoſitio contra verba expreſſa non eſt fienda." That the Counſel for the College had not controverted the extent of theſe words in their common and popular ſignification; but had contended, that at the time of the Foundation of this College, Conſanguinity was limited and bounded by all Laws, and particularly by the Canon Law (which was then in the higheſt eſteem) to ſome certain Degree. That the Civil Law, as then underſtood, limited Conſanguinity, according to ſome Writers, to the ſeventh, and according to others, to the tenth Degree in all collateral Succeſſions: that the Canon Law bounded it in many inſtances, and, in reſpect of Marriages and " Recuſatio Judicis," had ſtopt it at the ſeventh; and the Common Law of this Kingdom, in Challenges to Jurors and Sheriffs, at the ninth; and that the Court of Chancery had confined a Deviſe " to all Relations," to include only thoſe who could take as next of Kin under the Statute of Diſtributions. That, by the Feudal Law, Conſanguinity originally only took place in the deſcending Line lineally " ad infinitum;" and though by our Law now, it was as indefinite collaterally as lineally, yet the Law required a perſon, claiming by deſcent, to prove himſelf Heir, either to the firſt Purchaſer, or to the perſon laſt ſeiſed, who was preſumed to be of the Blood of the firſt Purchaſer. That general words may be reſtrained, and particular words enlarged by the ſubject-matter, and muſt be expounded always according to the meaning of the perſon who uſes them; and that the Founder muſt

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mean to have uſed them in a limited bounded ſenſe, which they always had in a legal ſignification. That the tenth was the remoteſt degree admitted by any Law, and that Mr. WYNNE, who was the neareſt, being in the eleventh degree, they muſt all be excluded.

THAT he thought there was no reaſon to infer ſuch an Intention from this Argument, but rather the reverſe; becauſe it was not to be conceived that ſo wiſe and learned a Prelate as the Founder (called by Lindwood, his ſecretary, the "lumen Legis") ſhould not have fixed the limit to his Conſanguinity, if he had intended it, when the inſertion of three words, "infra decimum gradum," or any other Degree he had choſen, would have aſcertained it; and as different Degrees, and different manners of computing them, had been adopted by different Laws, and even different Degrees to different purpoſes by the ſame Law, he could never mean to leave it open to conſtruction, which of thoſe Degrees he referred to: and as to the boundaries mentioned to have been ſet by the Laws in the inſtances mentioned, that he apprehended the Text of the Civil Law, cited by Dr. Wynne, ſhewed, that even in collateral Succeſſions, "ab inteſtato," there was no limit, but that parties "etiam in longiſſimo gradu," were entitled to ſucceed; and though ſome of the old Commentators, as Azo and others, had bounded the Relationſhip to the ſeventh or tenth Degree, yet all the Writers, ſince the Founder's time, had been of a different opinion; and that the reaſon given by Azo, &c. for bounding it in the collateral Line, (viz. becauſe it ought to be between perſons who might live to ſee one another) applied equally to the lineal deſcending Line; whereas it was admitted by all Writers, at all times, that lineal Conſanguinity extended "ad infinitum."

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THAT as to the Canon Law, in reſpect of marriages, the Prohibition, though formerly extended to the ſeventh Degree from lucrative motives, yet, at the time of the Founder, was contracted to the fourth; and it did not follow, that becauſe perſons were prohibited to marry within particular Degrees for particular reaſons, that they were not related at all out of thoſe Degrees: That if the fourth Degree were to be the limit, the great Grandſons of the Founder's Nephew, whom he might have lived to have ſeen, would have been excluded. In the inſtances given of the "Recuſatio Judicis," and Challenges to Jurors and Sheriffs, the Laws did not ſay that Conſanguinity ceaſed beyond thoſe Degrees which limited the Objection, but that thoſe diſtances removed any ſuſpicion of partiality: That the Laws, in bounding Conſanguinity in particular Caſes and for particular purpoſes, proceeded upon a ſuppoſition that Conſanguinity was infinite; becauſe there would have been no occaſion for drawing any line, if it had ceaſed of itſelf.

THAT the Court of Chancery had adopted the plan of the Statute of Diſtributions, in the conſtruction of Deviſes "to all Relations," for the ſake of certainty, and conſidering the Teſtator as meaning his next Relations, and to have ſaid no more than what the Statute had expreſſed; but that the next of Kin in the remoteſt Degree, would be entitled to a Diſtribution under that Statute, and it had been ſo held in Mrs. Windſor's Caſe, cited by Dr. Wynne; and therefore a Deviſe "to all Relations" would take in the next Degree, if it were ever ſo remote. In the Feudal Law, the intereſt of the Vaſſal was originally very little: at firſt perhaps, at pleaſure: then for Life: to ſons, to grandſons, to all in the lineal deſcending Line; and at laſt to all collateral

collateral Heirs whatſoever: that in the time of the Founder, and for many centuries before, the Common Law ſet no bounds to Conſanguinity, but gave a right of Succeſſion to Heirs at any diſtance.

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That the Counſel for the College could not tell which Degree to fix upon; but only that the Founder muſt mean ſome of the Degrees, and deſired his Grace to fix it: but if there was no Evidence of the Founder's Intention in that reſpect, it muſt be mere arbitrary Conjecture, and not found Conſtruction, to fix the Conſanguinity to any: and though the Counſel had mentioned the tenth, yet they knew, and admitted, that Degree would as effectually exclude all the Founder's Kinſmen now exiſting, as a much nearer Degree.

That he thought there was nothing to determine his Grace's Judgment as to any boundary at all; or if the Founder muſt be ſuppoſed to have uſed the words with any legal Reference, that in a Diſpoſition and Eſtabliſhment of his Real Eſtate under Letters Patent from the Crown, he might with much greater propriety be ſuppoſed to uſe the words in the ſenſe of the Common Law, than of any other Law whatſoever: That if the College were diſſolved, the Common Law would now give the Eſtate of the Founder to his Heirs at Law at any diſtance; or if the Founder had not appointed a Viſitor, the Viſitatorial Power would now be in the Heir of the Founder at any diſtance: and it would be a ſtrange expoſition of thoſe words, to deny the Preference to perſons as not being of the Blood of the Founder, when in the firſt inſtance they might take the whole Eſtate, and in the other Caſe, might have ſat as the ſupreme Judges upon this Queſtion, becauſe they were of the Blood of the Founder.

That the principal Clauſe in the Statutes, upon which the Queſtion ariſes, "in omni Electione Scholarium predictorum futuris tempo-

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" ribus in dictum Collegium facienda," &c. ſhews, that the Preference to his Relations was to accompany the Election in all times to come. The Perpetuity of the one, was as much the object of his contemplation, as of the other: they were to be commenſurate and coextenſive; and there is as much reaſon to limit the duration of the College, as the duration of the Preference he was giving to his Relations in the original Conſtitution of it. And it would be " maledicta expoſitio, corrumpens textum," to ſever, in conſtruction, ideas which the Founder had united in his own mind; and the Oaths to be taken by the Warden and Fellows, and the Statute " de Veſte," all concur in evidencing the ſame Intention.

Part of the Oath to be taken by the Warden is, " Ego, A. B. juro " quod omnia Statuta & Ordinationes hujus Collegii, ac omnia & " ſingula in eiſdem contenta, quatenus perſonam meam concernunt " vel concernere poterunt, ſecundum planum literalem & gramma- " ticalem ſenſum & intellectum eorundem inviolabiliter tenebo & " etiam obſervabo, ac, quantum in me fuerit, teneri faciam ab aliis, " & etiam obſervari, &c."

" Item, quod Conſanguineos dicti Fundatoris in veros Socios Col- " legii, juxta formam Ordinationis & Statuti ſuperius editi, ſine dif- " ficultate quacunque admittam, & procurabo admitti juxta poſſe " meo."

The like Oath, as to the Admiſſion of Founder's Kinſmen, is directed to be taken by every Fellow, at the time of his Admiſſion.

The Statute " de communi annua Veſte" is, " Statuimus quod " Cuſtos & Socii univerſi dicti Collegii infra Regnum Anglice exiſ- " tentes, tam noſtri Conſanguinei quam alii qui pro tempore fuerint,

" erga

" erga Feſtum Nativitatis Domini, annis ſingulis in perpetuum, Veſtes " de unâ & eâdem lectâ habeant, &c."

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THAT the Clauſe directing that, upon a failure of his Relations, a Preference ſhould be given to thoſe who were born in the Places where his Eſtates lay, and in default of ſuch, to perſons born within the Province of Canterbury, does not prove that he had a failure of Relations in his eye by an extenſion of kindred beyond any particular Degrees; but rather ſhews that a perpetuity of Preference was then in his mind: Relations might not offer themſelves as Candidates, or might not be qualified, or his whole Family might be extinct, or the Connection incapable of being proved. In the two firſt events, the Proviſion was only a temporary one; in the laſt, it was the ſubſtitution of a Preference, which " muſt" laſt for ever, to a Preference which " might" laſt for ever; but it would be inverting the plain avowed meaning of the Founder, to ſuffer Locality to take place of his Blood at the remoteſt diſtance that the mind can conceive; and though nice ſpeculative Calculations have been made to ſhew the quantity of the Founder's Blood in the fifteenth Degree, and that all Affection, which is ſuppoſed to be the foundation of the Bounty, muſt be worn out long ago, and all Relation of Kindred extinguiſhed, (as Lord Clarendon expreſſes it upon the pedigree of Lord Say and Sele, from William of Wickham) the Bounty is not confined to any particular proportion of the Founder's Blood. It is ſufficient there is any, to give it the Preference to a ſtranger.

THAT this Queſtion might have exiſted in the Founder's time: all perſons deſcended from the twelfth lineal Anceſtor of the Founder would have been in the ſame Degree with Mr. WYNNE. Suppoſe a perſon in that Degree, duly qualified in other reſpects, and a perſon

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born at a place where one of the Founder's Eſtates lay, had offered themſelves as Candidates; and the Founder had been aſked, to which he meant by his Statutes to give the preference: muſt not his Anſwer have been, "to my own Blood moſt certainly?" Would he have thought of computing what quantity of Blood there was in a human Body, and how much of that Blood ran in the veins of the Candidates, and then have determined the Queſtion according to the event of that Inquiry? or would he not have ſaid, "the leaſt proportion of my Blood ſhall turn the ſcale againſt Locality, which I ſubſtitute only upon the Non-appearance of any perſons of my own Blood at the Election;" and it is a miſtake to ſuppoſe Affection, in the proper ſenſe of that word, to be the foundation of this kind of Proviſions, where there can be no lineal Deſcendants; it is rather, Reverence for Anceſtors, who are the common Stocks from whence the Collaterals muſt all branch, than affection for individuals, never exiſting to the Founder.

That the advancement of Learning, for the good of the Public, may be the only motive of the Endowment of Colleges; and perhaps in many, was the only motive. A deſire in the Founder to perpetuate his Name, and to erect the moſt durable monument which could be built to preſerve the memory of his virtues, might very laudably co-operate with his Public Spirit: and when Proviſions are made for the Founder's own Family in the Foundation, it is plain that the ſame principle, which produces ſtrict Family Settlements, had ſome influence on his mind, in his Benefaction to the Public. That principle always affects Perpetuity; and he conſidered the Founder as actuated by that Principle in the giving the Preference to his Blood. It is in the nature of a Family Settlement, modified ſo as to be ſubſervient to the great and

and principal object of his Munificence, the Good of the Public; wiſhing at the ſame time, that the Public might receive that Good through his own Relations, as long as he had any.

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That it was ſaid, he could not have made a Settlement, which would not have left it in the power of the Family to have alienated; and therefore, as a Family Proviſion, it ought not to ſubſiſt "ad infinitum:" but that was a miſtake, for in the time of the Founder, and for near two Centuries before, an Eſtate might have been ſettled in ſuch manner as would have taken in all the Claimants as Heirs male of the Body of the Founder's Father, or any of his Anceſtors. Fines and Recoveries were the invention of a ſubſequent age. As the Law then ſtood, a Perpetuity might have been created from any Stock the Founder had fixed upon; a very ſtrong argument to ſhew he intended a Perpetuity of Preference, when he was ſubſtituting this Preference as ſome equivalent for his Eſtate, which, in the opinion of thoſe times, might have been perpetuated in his Family.

That it is admitted, the Blood never wears out in the lineal deſcending Line: the collateral Line is as the lineal to the Founder, who could have no legitimate Children; and at a time, when Land given to a man and his Heirs, would by the Feudal Law have gone only to his lineal Deſcendants; yet, if an Eſtate was given in that manner to a Churchman, it went to his collateral Heirs, becauſe he could have no other.

That much ſtreſs has been laid upon a difference between Proximity and Propinquity: that when the Inquiry was (as in Succeſſions) who was the next Heir or next of Kin, remoteneſs was no objection; but when the Inquiry was, whether of Kin at all, there it muſt be bounded. That in caſe there was a claſs of perſons in the eleventh, and another

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in the twelfth Degree, and the diſpute was, who was next of Kin, it might be fixed to the eleventh, becauſe it would not be univerſal; whereas, if the diſpute was about Propinquity, that is, who were of Kin, it muſt take in all to the one thouſandth Degree, unleſs it was bounded.

That it appeared unintelligible how the eleventh Degree is in any Caſe whatever to be conſidered as the next of Kin, when contraſted with a more remote Degree, and at the ſame time, when uncontraſted with a remoter Degree, to be conſidered as no Kin at all.

That it had been ſaid, that there is an abſolute neceſſity of bounding Conſanguinity, becauſe it would lead to an entire Univerſality: That it muſt multiply into millions, and would monopolize the whole Bounty of the Founder, and alſo other additional Bounties given by ſubſequent Benefactors, without any preference to the Kinſmen of the Founder: That all Benefactions of this kind are given for the advancement of Learning, and as prizes for eminent and ſuperior abilities: That Founder's Kinſmen may be as eminent as mere ſtrangers, but that it had been held that it was not neceſſary they ſhould be equal in abilities to ſtrangers; that a Founder's Kinſman had upon an Appeal been determined to be qualified, if he could conſtrue a Latin Verb out of the Accidence; and that the general intention of the Founder was encountered by tying up the College to poſtpone great merit and abilities in their Elections.

That the College has no reaſon to object to the extenſion of the Conſanguinity "ad infinitum," as leading to a Univerſality; becauſe, when that is the caſe, the College may prefer any of the Candidates they pleaſe, and which ſeems to be the object of their wiſhes; and, in its progreſs towards Univerſality, the circle of Conſanguinity will widen very

very faſt, and conſequently the more extenſive their choice muſt be; for not being bound down to take the neareſt relations, they might always elect the worthieſt; and when the Blood was oppoſed by ſtrangers, the Preference ought not to be given unleſs there was ſuch a degree of Learning and Merit as deſerved encouragement in "Arbitrio boni viri." An exact parity of Learning or natural parts, would be too ſtrict a meaſure; but there certainly ought not to be a great diſproportion; and if the whole bounty was monopolized by perſons ſo qualified, it would be moſt agreeable to the Founder's intention; for he meant the advancement of Learning through the medium of his own Family in the firſt place, and thereby united two very laudable purpoſes, the good of his own Family, if they deſerved it, and the good of the Public: and if ſubſequent Benefactors ingraft upon the original Foundation, it is an evidence they intended their benefactions ſhould follow the plan of the original Foundation; and if they did not intend it, they ſhould have provided againſt it in their Eſtabliſhments; and if the College accepts the Bounty upon different terms, they muſt comply with them.

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THAT there was no danger of monopoly to the Founder's Family, from the great difficulties of proving Pedigrees and the many Qualifications required in the Candidates; and as to limiting any particular number of Fellowſhips to the Founder's Family, that his Grace had no ſuch authority: That he was not to controul the Founder's Laws, but to execute them; and if Biſhop Hooper's Decree for limiting the Fellowſhips in William of Wickham's Foundation was truly ſtated, he thought it an illegal one.

UPON the whole, Mr. Juſtice WILMOT was of opinion, that it was moſt clearly the Intention of the Founder to give a Preference

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to his Blood, "ad infinitum;" and that no boundary line could ever be drawn to the Conſanguinity, but by the hand of Time, which ſooner or later levels all diſtinction of Families, and obliterates every other Memorial of Human Greatneſs.

BUT he ſubmitted his Opinion to his Grace's much ſuperior Wiſdom and Judgment.

His GRACE the ARCHBISHOP Pronounced for the Appeal, and that the pretended Election of WILLIAM VYSE and JAMES POOLE was void; but gave no Coſts: and Decreed the Statutes of the College to be delivered out of Court.

HOUSE OF LORDS.

JOHN Earl of BUCKINGHAMSHIRE, and MARY ANN, Counteſs of BUCKINGHAMSHIRE, his Wife, late MARY ANN DRURY, Spinſter; JOCOSA CATHARINA DRURY, Spinſter, an Infant, by her next Friend - } APPELLANTS.

DAME MARTHA DRURY, Widow - - - - - - - RESPONDENT.

1762. Earl of Buckinghamſhire againſt Drury.

BY Indenture Tripartite, dated 5th October 1737, previous to a marriage between the Reſpondent, (the Mother of the Appellants, the Counteſs of BUCKINGHAMSHIRE, and JOCOSA CATHARINA DRURY,) and Sir THOMAS DRURY, Baronet, deceaſed, who was the Father of the ſaid Appellants, and made between the ſaid Sir THOMAS DRURY, of the firſt part; the Reſpondent, then MARTHA TYRRELL, Spinſter, one of the Daughters of Sir JOHN TYRRELL, Baronet, deceaſed, of the ſecond part; and JOSEPH TOWNSEND and THOMAS MATTHEWS, Eſquires, of the third part: after reciting the intended marriage, it was declared and agreed, that the ſaid Sir THOMAS DRURY ſhould be entitled to and receive all the perſonal Eſtate and Effects, which the Reſpondent was poſſeſſed of or entitled to, for his own uſe and benefit; and that all the Lands, Tenements, and Hereditaments, then late of the ſaid Sir JOHN TYRRELL, which ſhould deſcend to or devolve upon the Reſpondent, during the intended Coverture, ſhould be ſettled and aſſured in manner therein after mentioned; and alſo that the Reſpondent, in caſe ſhe ſhould ſurvive the

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ſaid Sir THOMAS DRURY, ſhould have and enjoy a clear Annuity of £. 600, during her Life, for her Jointure, and in full ſatisfaction and bar of all Dower; and alſo in lieu and full ſatisfaction of any ſhare or diſtributary part of any Perſonal Eſtate, which the ſaid Sir THOMAS DRURY ſhould be poſſeſſed of or entitled to, and which ſhe ſhould or might claim or demand, by virtue of the Statute for the Diſtribution of Inteſtates Eſtates; or otherwiſe howſoever. And Sir THOMAS DRURY, in conſideration of the ſaid intended marriage, and of the Portion which the Reſpondent was poſſeſſed of or entitled to, and which would accrue to him in caſe the ſaid Marriage ſhould take effect, did, for himſelf, his heirs, executors, and adminiſtrators, covenant with the ſaid JOSEPH TOWNSEND and THOMAS MATTHEWS, their executors and adminiſtrators, that the heirs, executors, and adminiſtrators of him, Sir THOMAS DRURY, in caſe the Reſpondent ſhould ſurvive him, ſhould pay her, during her life, the clear yearly ſum of £. 600 half-yearly; and alſo that in caſe any Lands of the ſaid Sir JOHN TYRRELL, deceaſed, ſhould in anywiſe deſcend or come to the Reſpondent, during her ſaid coverture, then Sir THOMAS DRURY and the Reſpondent ſhould and would immediately thereupon convey, ſettle, and aſſure all ſuch Lands to the uſe of Sir THOMAS DRURY, during his Life, Remainder to the uſe of the Reſpondent and her aſſigns, during her life; and after her death, to the uſe of the ſaid Sir THOMAS DRURY, and his heirs and aſſigns for ever.

This Deed was executed by Sir THOMAS DRURY and the Reſpondent, being then an Infant under the age of twenty-one years, in the preſence of ELIZABETH KELLAWAY, the Reſpondent's then Guardian, who was a ſubſcribing Witneſs thereto. The Marriage was ſolemnized ſoon after, with the privity and approbation of the ſaid

ELIZABETH KELLAWAY; and the Reſpondent, at ſuch Marriage, was entitled to a Portion not exceeding £. 2,000.

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On the 20th January 1759, Sir THOMAS DRURY died inteſtate, being ſeiſed in Fee Simple of a Real Eſtate of the yearly value of £. 2,600; and he was alſo at his death poſſeſſed of a Perſonal Eſtate to the amount of £. 60,000 or upwards; and at his death left the Reſpondent, his Widow, and the Appellants the Counteſs of BUCKINGHAMSHIRE and JOCOSA CATHARINA DRURY, his only children and co-heireſſes at Law, being both then Infants.

Soon after the death of Sir THOMAS, Letters of Adminiſtration of his Perſonal Eſtate were granted to the Reſpondent, and ſhe poſſeſſed the ſame or great part thereof; and afterwards inſiſted, that as ſhe was an Infant at the time of the execution of the aforeſaid Indenture of Settlement, and at the time of the ſolemnization of her Marriage, ſhe was not bound to accept the Proviſion thereby made for her, but that ſhe was entitled to Dower out of the Real Eſtate of Sir THOMAS DRURY, and to her diſtributive Share of all his Perſonal Eſtate.

And therefore the Appellants, the Counteſs of BUCKINGHAMSHIRE (then MARY ANN DRURY, Spinſter) and JOCOSA CATHARINA DRURY (both then Infants) by their next Friend, in Trinity Term 1759, exhibited their Bill in the Court of Chancery againſt the Reſpondent, ſtating the beforementioned particulars, and praying that an account might be taken of the Rents and Profits of the Real Eſtate of Sir THOMAS DRURY, received by the Reſpondent, and alſo of the Perſonal Eſtate, and the Intereſt and Profits thereof, and of his Debts and Funeral Expences; and that the clear ſurplus of his Perſonal Eſtate, after payment of his Debts, might be brought into Court, and placed out at Intereſt for the benefit of the Appellants,

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during their minority; that proper perſons might be appointed to receive the Arrears and growing Rents and Profits of the Real Eſtates, and alſo of the Perſonal Eſtate, during the minority of the ſaid Appellants; and that out of the Rents and Profits of ſuch Real Eſtate, and the Intereſt and Produce of ſuch Perſonal Eſtate, the ſaid Annuity of £. 600 might be retained by, or paid to the Reſpondent for the time paſt and to come; and that a ſuitable Allowance might be made for the Maintenance and Education of the Appellants for the time paſt and to come; and that the ſavings of the Appellants yearly Income, after deducting what ſhould be ſo paid for their Maintenance and Education, might be from time to time placed out at Intereſt, and improved for their reſpective benefit, during their Minority.

To this Bill the Reſpondent put in her Anſwer, and thereby ſaid, that ſhe had poſſeſſed ſo much of the Perſonal Eſtate of Sir Thomas Drury as ſhe was able, but that ſhe had not received any Rents or Profits of his Real Eſtate; and ſhe inſiſted, that as ſhe was an Infant when ſhe executed the ſaid Indenture of Settlement, and at the time of her Marriage, ſhe could not nor ought to be barred by the ſaid Indenture, but was at liberty to make her Election, whether ſhe would accept the ſaid Annuity, or waive the ſame, and take her Dower out of the Real Eſtate of Sir Thomas Drury, and her diſtributive Share of his Perſonal Eſtate under the Statute; and ſhe ſubmitted to account, having all juſt allowances: and if the Court ſhould be of Opinion ſhe was at liberty to waive the Annuity of £. 600, and to claim ſuch rights as ſhe was by law entitled to, in and to the Real and Perſonal Eſtates of Sir Thomas Drury, then ſhe waived the Annuity, and claimed to be entitled for her Life to a third

part

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part of the Real Eſtates, as her Dower; and alſo to be entitled abſolutely to a third part of the clear Reſidue of his Perſonal Eſtate, and of the Intereſt and Produce thereof. But if the Court ſhould be of Opinion, that ſhe was bound by the ſaid Indenture, notwithſtanding ſhe was an Infant at the time of executing the ſame, then ſhe claimed to be entitled, by virtue of the ſaid Indenture, to a clear Annuity of £. 600 per annum, from the time of the death of Sir THOMAS DRURY, payable half-yearly during her life; the firſt payment to be made on the 25th March 1759; and ſhe alſo claimed a ſuitable allowance for the Maintenance of the Appellants her Daughters, from the death of their Father to that time, and alſo for ſuch further time as ſhe ſhould maintain them.

This Anſwer being replied to, Depoſitions were taken in the Cauſe, whereby it appeared that the Reſpondent was born on the 23d December 1716, and intermarried with Sir THOMAS DRURY, on the 11th October 1737.

The Cauſe was heard *(a)* before Lord Chancellor HENLEY, on the 27th, 28th, and 29th February 1760, and the 3d, 4th, 6th, and 7th of February, and 1ſt June 1761; on the laſt of which days, his

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(a) Vide Harg. Co. Litt. 36. 6. note 7. Where, ſpeaking of this Caſe of DRURY *v.* DRURY, Mr. Hargrave ſays, "The points determined by Lord Northington were, 1ſt, "That the Statute of 27 H. VIII. which introduced Jointures, extends to adult women "only, Infants not being particularly named; and therefore, that notwithſtanding a "Jointure on an Infant, ſhe may waive the Jointure, and elect to take Dower. 2d. That "a Covenant by the Huſband, that his heirs, executors, or adminiſtrators, ſhall pay the "Wife an Annuity for her life in full for her Jointure, and in bar of Dower, without "expreſſing that it ſhall be charged on any particular lands, or be ſecured out of lands "generally, is not a good equitable Jointure within the Statute. 3d. That a Woman, "being an Infant, cannot by any contract, previous to her Marriage, bar herſelf of a diſ-"tributive Share of her Huſband's perſonalty, in caſe of his dying inteſtate."

Lordſhip

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Lordſhip Decreed, that it ſhould be referred to the Maſter to take an Account of the Perſonal Eſtate of Sir THOMAS DRURY, come to the hands of the Reſpondent, and of his Debts and Funeral Expences, which were to be paid out of his Perſonal Eſtate, in a courſe of Adminiſtration; and his Lordſhip declared that the Reſpondent, being an Infant at the time of her executing the Indenture of the 5th of October 1737, was not barred of her Dower in the Inteſtate's Real Eſtate, nor of her ſhare of his Perſonal Eſtate, under the Statute of Diſtributions; and therefore his Lordſhip Ordered, that ſo much of the Bill as ſought to bind the Reſpondent by the ſaid Agreement, ſhould ſtand diſmiſſed, and that the clear ſurplus of the ſaid Inteſtate's Perſonal Eſtate, after payment of his Debts and Funeral Expences, ſhould be divided into three equal parts, whereof one-third part was to be paid to or retained by the Reſpondent, as her ſhare thereof, under the ſaid Statute, and the other two-third parts thereof were to be inveſted in the purchaſe of Three per Cent. Bank Annuities, in the name and with the privity of the Accountant General, in Truſt, in this Cauſe, for the benefit of the Appellants, the Counteſs of BUCKINGHAMSHIRE and JOCOSA CATHARINA DRURY reſpectively, until they ſhould attain their age of twenty-one years, and he was to declare the Truſt thereof accordingly, ſubject to the further Order of the Court: and if the ſaid two-third parts belonging to the Appellants reſpectively, or any part thereof, had been already inveſted in Government Securities, the ſame were to be transferred to the ſaid Accountant General, in Truſt in the Cauſe, for the ſaid Appellants' benefit; and he was to declare the Truſts thereof in like manner: and the Appellants were to be reſpectively at liberty to apply to the Court for further Directions relating thereto as there ſhould be occaſion;

caſion; and Directions were given concerning the Allowance for the Maintenance and Education of the Appellants; and a Receiver, who had been before appointed of the Inteſtate's Real Eſtate, under an Order made in the Cauſe, was to be continued until the further Order of the Court, to paſs his Accounts before the Maſter, and to pay one-third part of the clear yearly Rents of the ſaid Inteſtate's Real Eſtate, from time to time as the ſame ſhould be received by him, to the Reſpondent, in lieu and ſatisfaction of her Dower, and the other two-third parts of ſuch clear yearly Rents, from time to time as the ſame ſhould be received, into the Bank, with the privity of the ſaid Accountant General, to the Account of the Cauſe; and Directions were given for placing out ſuch two-third parts of the ſaid Rents from time to time, for the benefit of the Appellants, the Counteſs of BUCKINGHAMSHIRE and JOCOSA CATHARINA DRURY; and all parties were to be paid their Coſts of the ſuit to that time, to be taxed by the Maſter, out of the Inteſtate's Eſtate; and his Lordſhip reſerved the conſideration of ſubſequent Coſts, until after the Maſter ſhould have made his Report.

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Soon after pronouncing this Decree, viz. 14th June 1761, the Appellants, the Earl and Counteſs of BUCKINGHAMSHIRE, intermarried, and the Cauſe having been duly revived on that occaſion, the preſent Appeal was brought to reverſe the Decree.

After hearing Counſel on this Appeal, the following Queſtion was put to the Judges by their Lordſhips; viz.

"WHETHER a woman, married under the age of twenty-one years, having before ſuch marriage a Jointure made to her in bar of Dower,

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Dower is thereby bound and barred of Dower within the Statute of the 27th Hen. VIII?"

The Judges differing in Opinion, they were directed to deliver their Opinions "ſeriatim," with their Reaſons.

Mr. Justice Wilmot.

THIS Queſtion depends entirely upon the true conſtruction of the ſeveral Clauſes in the 27 Hen. VIII. Ch. 10. *(a)*, relating to Jointures; and in order to get at that conſtruction, it will be neceſſary to conſider

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(a) The Clauſes are,—

6. "And be it further Enacted by the Authority aforeſaid, That whereas divers "perſons have purchaſed, or have Eſtate made and conveyed, of and in divers Lands, "Tenements, and Hereditaments, unto them and to their Wives, and to the Heirs of "the Huſband, or to the Huſband and to the Wife, and to the Heirs of their two bodies "begotten, or to the Heirs of one of their bodies begotten, or to the Huſband and to the "Wife for the term of their Lives, or for term of Life of the ſaid Wife; or where any "ſuch Eſtate, or purchaſe of any Lands, Tenements, Hereditaments, hath been or here-"after ſhall be made to any Huſband, and to his Wife, in manner and form above ex-"preſſed, or to any other perſon or perſons, and to their Heirs and Aſſigns, to the uſe "and behoof of the ſaid Huſband and Wife, or to the uſe of the Wife, as is before re-"hearſed, for the Jointure of the Wife; that then in every ſuch caſe, every woman "married, having ſuch Jointure made or hereafter to be made, ſhall not claim, nor have "title to have any Dower of the reſidue of the Lands, Tenements, or Hereditaments, "that at any time were her Huſband's, by whom ſhe hath any ſuch Jointure, nor ſhall "demand nor claim her Dower of and againſt them that have the Lands and Inheri-"ritances of her ſaid Huſband; but if ſhe have no ſuch Jointure, then ſhe ſhall be ad-"mitted and enabled to purſue, have, and demand her Dower, by Writ of Dower, after "the due courſe and order of the Common Laws of this Realm; this Act, or any Law "or Proviſion made to the contrary thereof, notwithſtanding."

7. "Provided alway, That if any ſuch woman be lawfully expulſed or evicted from "her ſaid Jointure, or from any part thereof, without any fraud or covin, by lawful "entry, action, or by diſcontinuance of her Huſband, then every ſuch woman ſhall be "endowed of as much of the reſidue of her Huſband's Tenements or Hereditaments, "whereof ſhe was before dowable, as the ſame Lands and Tenements ſo evicted and "expulſed ſhall amount or extend unto."

8. "Provided

conſider the manner of making Proviſions for Wives upon Marriages, and for the Iſſue of thoſe Marriages; and how the Law ſtood, both in reſpect of theſe Proviſions and of Dower, before that Statute was made, and what alteration it intended to make in this ſpecies of Property.

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Before that Statute, the legal Eſtate of the greater part of the real property in the Kingdom was, for reaſons unneceſſary to be now mentioned, in the hands of Feoffees to Uſes or Truſtees; and when perſons who were in poſſeſſion, and received the Rents and Profits of thoſe Eſtates, married and died, Women were not dowable of thoſe Eſtates, becauſe the legal Seiſin had always remained in the Feoffees, and had never been in their Huſbands.

The conſequence ariſing from this ſeparation of the legal and uſufructuary Intereſt was, that Huſbands provided for their Wives be-

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8. "Provided alſo, That this Act, nor any thing herein contained or expreſſed, extend or be in anywiſe hurtful or prejudicial to any Woman or Women heretofore being married, of, for, or concerning ſuch Right, Title, Uſe, Intereſt, or Poſſeſſion, as they or any of them have, claim, or pretend to have, for her or their Jointure or Dower, of, in, or to any Manors, Lands, Tenements, or other Hereditaments, of any of their late Huſbands, being now dead or deceaſed; any thing contained in this Act to the contrary notwithſtanding."

9. "Provided alſo, That if any Wife have, or hereafter ſhall have any Manors, Lands, Tenements, or Hereditaments, unto her given and aſſured, after Marriage, for term of her Life or otherwiſe, in Jointure, except the ſame aſſurance be to her made by Act of Parliament, and the ſaid Wife, after that, fortune to overlive her ſaid Huſband, in whoſe time the ſaid Jointure was made or aſſured unto her, that then the ſame Wife ſo overliving, ſhall and may at her Liberty, after the Death of her ſaid Huſband, refuſe to have and take the Lands and Tenements ſo to her given, appointed, or aſſured, during the Coverture, for term of her Life or otherwiſe, in Jointure, except the ſame aſſurance be to her made by Act of Parliament as is aforeſaid, and thereupon to have, aſk, demand, and take her Dower, by Writ of Dower or otherwiſe, according to the Common Law, of and in all ſuch Lands, Tenements, and Hereditaments, as her Huſband was and ſtood ſeiſed of any ſtate of inheritance, at any time during the Coverture; any thing contained in this Act to the contrary thereof notwithſtanding."

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fore or after Marriage, either by Feoffments made to the Uſes of themſelves and their Wives, under the Statute of 1 Rich. III. which enabled Ceſtui que Uſe to convey; or by limiting Uſes to them by Deed; or by taking Conveyances of the legal Eſtate from their Feoffees to themſelves and their Wives, either for Life or in Tail; and ſometimes the Anceſtors, or collateral Relations of the Huſband, conveyed Eſtates to the Huſband and Wife for Life, or in Tail; and being uſually made to them "jointly," this kind of Proviſion, from thence, acquired the name of a "Jointure."

The Statute of the 11 Hen. VII. c. 20. was made on purpoſe to guard theſe Proviſions, and to avoid all Diſcontinuances, Alienations, and Warranties made by Wives of theſe Eſtates, to the prejudice of the Iſſue or Heirs of the Huſband: and though the word Jointure is not in the 11 Hen. VII. yet it was held 1 Leo. 261. 1 Cro. 2. that no Eſtate, limited to a Wife, is within the meaning of that Statute, unleſs it appears to have been made for her Jointure, where the Inheritance was to go to the Iſſue or Heirs of the Huſband: and theſe Proviſions went by the name of Eſtates made "ex proviſione viri;" and from this Statute of the 11 Hen. VII. and alſo from the recital in the Clauſe relating to Jointures in 27 Hen. VIII. it appears, that theſe Eſtates were frequently limited to the Huſband and Wife, and the Heirs of their bodies, and ſometimes to the Huſband and Wife, and to the Heirs of the body of the Wife; and the ſtricteſt Settlement which could be made at the time of paſſing this Act, was to limit the Eſtate to the Heirs of the body of the Wife, ſo as to bring it within the protection of the Act of the 11 Hen. VII. The Limitation to Truſtees, to preſerve contingent Remainders, was not then invented; and therefore, if the Eſtate was limited to the Huſband

for

for Life, Remainder to the firſt and every other Son of the Marriage, he might bar the contingent Remainders before the exiſtence of Iſſue; or if the Eſtate was limited to the Huſband in Tail, he might bar the Eſtate Tail, and the Remainders too, by a Recovery. The moſt that could be done, was to veſt the Eſtate Tail in the Wife; and then it was under the protection of the 11 Hen. VII.; and it appears from the Books, that theſe kinds of Limitations were very frequent, ſometimes of the Eſtate itſelf; but oftener of the Uſe; and it was more natural they ſhould be ſo, becauſe it was carrying the check upon Alienation, ſo anxiouſly aimed at by every body, as far as the policy of the Law would then endure.

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And it was uſual to make theſe kinds of Limitations, not only upon the proſpect of a Marriage, then under immediate contemplation; but Eſtates were ſettled by Anceſtors, and taken upon Purchaſes, with Limitations to women whom they or their Sons ſhould afterwards marry, without a view to, or ſo much as the knowledge of any particular Woman who was to take under it.

And I lay infinite ſtreſs upon this mode and faſhion of Settlements at the time of making the Act, becauſe it will open the true reaſon of giving them the quality of a Bar of Dower, and that reaſon will apply as ſtrongly in the caſe of Infants as of Adults.

One great inconvenience accompanied theſe kinds of Proviſions; for whether they were made before or after Marriage, if the Huſband had the legal Seiſin of any other Eſtates, either in Fee or Fee Tail, the Wife would be entitled to Dower in thoſe Eſtates, and keep the Jointure too.

This inconvenience did not frequently happen, becauſe the legal Eſtate and the Uſe were ſeldom in the ſame hand; and huſbands

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had it abſolutely in their power to prevent it, by putting the Eſtates, which they had before their Marriage, into Feoffees, and by taking all ſubſequent Conveyances to Feoffees, or to themſelves and others jointly, ſo as to prevent the right of Dower from ever attaching. But when the Legiſlature had come to a Reſolution to conſolidate the Uſe and the legal Eſtate, and to unite them together to all intents and purpoſes, they ſaw very plainly, that it was neceſſary to make ſeveral Regulations, not only in reſpect of the immediate and inſtantaneous influence which this conſolidation would have upon real Property, as between perſons then married, but alſo as to perſons who ſhould marry after the Act was made.

From the Preamble of the Statute, it is clear the Legiſlature intended that one conſequence ariſing from this union ſhould take place in its fulleſt extent, and that was, in Caſes, where no Settlements had been made upon Wives, "ex proviſione viri."

In thoſe Caſes, all Wives, preſent and future, were to have Dower of all the Eſtates of Inheritance, whereof their Huſbands were ſeiſed during the Coverture. And in this reſpect, the Act was very beneficial to Wives. It was not an enabling Act; for it did not give a Right of Dower; but the Conſolidation ampliated and enlarged the fund and ſubject-matter of that right, by putting all their Huſband's Eſtates within the reach of it.

It is equally clear, that where Settlements had been made upon Wives, "ex proviſione viri," whether they were made before or after Marriage, the Legiſlature intended that they ſhould not retain the Eſtates given by thoſe Settlements, and be entitled to Dower beſides: and in this reſpect the Act was an abridgment of the Right, which the Common Law gave them, of retaining both; and another thing

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thing is equally clear, that the Act leaves Widows, who were then living, exactly as it found them, entitled either to their Settlement, "ex proviſione viri," or to Dower, or to both, or to neither, in the ſame manner as they would have been, if the Act had never been made.

When the Legiſlature had determined that Widows ſhould not have both Jointure and Dower, it became neceſſary to determine which they ſhould have, either to make Jointure bar Dower, or Dower bar Jointure, or to give them their choice.

They reſolved that a Jointure ſhould bar Dower; but qualified and relaxed the Rule, by giving a choice, where the Jointure had been made *after* Marriage.

The ſubſtance of the Clauſes, expreſſing the intention of the Legiſlature upon the ſeveral points I have mentioned, is, that a Woman who then had, or thereafter ſhould have, a Jointure made, ſhould not have Dower in the reſidue of her Huſband's Eſtate; but, if ſhe was evicted of all, or any part, then ſhe was to have a compenſation out of the reſidue of her Huſband's Eſtate; or if the Jointure was made after Marriage, ſhe might refuſe her Jointure and claim her Dower, with a proviſo to ſave the Rights of Widows then exiſting. And it is very material in this place to obſerve, that the Act does not lay down two different Rules, one for Jointures which had been made before the Act, and another for Jointures which ſhould be made after the Act; but the Rule laid down in one caſe, was to govern equally in the other.

It is impoſſible to ſever the Caſes in point of conſtruction, becauſe they are connected together in the ſame ſentence: the words are ſpoken in the ſame breath, "Jointures made or hereafter to be made:" the meaſure of the Right was to be exactly the ſame; and indeed the

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Clauſe is worded in ſuch a manner as to ſhew, they had their eye principally upon the Right of perſons who were then married.

And though it was alſo intended, " imponere normam futuris," yet the immediate object in their thoughts, was the Caſe of Women then living, and the adjuſtment of their Rights was to be the model by which the Rights of all Women, who ſhould be married after the Act, were to be determined; and this Caſe muſt now be conſidered as the Caſe of an Infant married at the time of the Act, and ſurviving her Huſband; and therefore the true Queſtion in this Caſe is really no more than this:

Whether the words in this Act of Parliament, " every Woman married having ſuch Jointure made," that is, having a Settlement " ex proviſione viri," with ſuch Limitations as are mentioned in the Recital, or which fall within the Equity of thoſe Limitations, did not comprize every Woman then married, whether ſhe was an Infant, or an Adult Perſon, when ſhe married.

If the words, " being under age, or of full age," had been added to the words, " every Woman married," there could have been no doubt but ſhe would have been bound by them.

I think that it appears as clearly to be the intention of the Legiſlature to comprize Infants in theſe general words, as if they had been expreſsly named.

1ſt.—The words are general, " every Woman married," without diſtinguiſhing, whether they were of age or under age; and therefore, taking them in their common and ordinary ſignification, they comprize Infants as well as Adult Perſons.

And the Exceptions and Notice taken of Infants in many Acts of Parliament, are a ſtrong indication of the ſenſe of the Legiſlature, that

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even in reſpect of Parliamentary Bars to their Right, general words would include them.

The 1 Rich. III. c. 7. directing that Fines conclude as well Privies as Strangers, excepts Infants.

The Statute 4 Hen. VII. c. 24. excepts them particularly, and that Act is worded in ſuch a manner as to ſhew, moſt manifeſtly, the Legiſlature thought that the words, "the Fine to be a final end, and "conclude as well Privies as Strangers to the ſame," would have comprized Infants, if they had not been excepted.

And the Caſe of Stowell and Zouch, in Plowden's Commentaries, is a direct Authority in point, that in a Caſe which does not fall within the Exceptions of that Law, the general words extend to Infants, as well as Adult Perſons:

A Diſſeiſor levied a Fine: two years paſt: the Diſſeiſee died, leaving an Infant Heir at Law, who inſiſted that he was not barred by the Fine till five years after he came of age; but as the exception did not extend to that Caſe, and the time began to run in the Life of his Anceſtor, it was held that it ſhould run againſt him, as if he had been an Adult.

1 Rich. III. c. 1. enabling Ceſtui que Uſe to make Feoffments, proceeds upon a ſuppoſition that general words would include Infants; and to guard againſt that conſequence, adds to the general words, "any perſon or perſons being of full age."

The 23 Hen. VIII. and 21 Jac. I. Statutes of Limitations, except them particularly, upon an apprehenſion that the general words, "perſon or perſons" would have included them.

The Statute 31 Hen. VIII. c. 13. ſect. 16. enacts, "That the "King ſhall hold and enjoy all ſuch Honours, Caſtles, Manors,

"Lands,

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" Lands, &c. as he hath obtained, and has by way of exchange, " bargain, purchaſe, or other whatſoever mean or means, according " to the true intent and meaning of his highneſſes's bargain, exchange, " or purchaſe, notwithſtanding any miſ-recital, miſ-naming, non-" recital, or not naming of the Honours, Caſtles, &c. compriſed or " mentioned in the writings or bargains made between the King's " highneſs and any other party or parties, or of the towns or counties " where they lie—with a ſaving of the rights of all perſons, except " the perſons themſelves, of whom the bargain, exchange, or purchaſe " was had, their Heirs and their Wives."

This Act took away the Right of Dower from the Wives of the Grantors; and the exception of Wives out of the Saving, ſhews the ſenſe of the Legiſlature upon a Title of Dower—That it was "a ſmall thing and caſual," and therefore took it away from her, though ſhe was not ſo much as party to the Grant.

The Huſband might then have defeated Dower by Felony as well as Treaſon; and as he might have deprived his Wife of it by a Crime, the Act gave the ſame effect to his grant.

The exception out of the Saving, evidences the intention of the Legiſlature to take the Dower away, without any equivalent at all.

So in Needler *v.* Biſhop of Wincheſter, Hob. 224. Lord Hobart ſpeaking of this Statute, ſays, " As touching the meaning of the Sta-" tute to this purpoſe: the purpoſes of theſe Statutes were to eſtabliſh " Conveyances to and from the King, according to natural Equity, " ſecundum equum & bonum," which is, " Lex Legum," without " reſpect to legal ceremonies: but it was never meant to enable thoſe " perſons, or their Grantees, who by natural defects or diſable-" ments were, either by the Law of Nature, or by the Law of the " Land,

" land, diſabled to grant; and therefore, if an Idiot, Lunatic, or " an Infant under ſeven years of age, had made a Grant to the King, " this Statute had never made theſe good, for " Jura Naturæ ſunt " immutabilia."

Earl of Buckinghamſhire againſt Drury.

" To conclude, as this Statute doth not confirm a Grant made of " that, which is not the Grantor's to give; ſo theſe weak perſons are " owners of the lands, to hold and retain to themſelves, but are " eſteemed in Law as not owners to give them away; and therefore " it was a needleſs explanation in the Statute of Wills, that Idiots, " and the like, ſhould not be enabled to deviſe."

" The objection that was inferred out of the Saving of the Statute, " where Wives were excepted, that therefore they were meant to " be bound, moves me nothing: for (beſides that it is a weak, im- " plicit, and indirect inference to let in ſo great an abſurdity and in- " congruity of Law) that Exception doth not reach unto the Wives " that are Parties, that is, to ſuch as join in the Grant of their own " Eſtates; but to the Wives of the Parties to the Grants, that is, hav- " ing nothing but of the Wives Title of Dower, which being a ſmall " thing and caſual, they were content to free the King's Eſtate of; " the words are " other than the Parties, their Heirs, and Wives;" " ſo they put the Wife in rank with the Heir."

The Statute of Wills being conceived in general words, the 34 Hen. VIII. takes Infants out of thoſe general words; and though I concur with Lord Hobart in thinking that it was not neceſſary to inſert ſuch an Exception, becauſe an Act enabling perſons to convey by a Will, could never have been conſtrued to capacitate a perſon to convey, who could not convey by Deed; yet the more unneceſſary it

Earl of Buckinghamſhire againſt Drury.

was, the more ſtrongly it fortifies the inference drawn from it in favour of the extent of the general words in an Act of Parliament.

But many Caſes have been put where the Law implies an Exception, and takes Infants out of general words, by what is called a "virtual" Exception.

I have looked through all the Caſes; and the only Rule to be drawn from them is this, that where the words of a Law, in their common and ordinary ſignification, are ſufficient to include Infants, the virtual Exception muſt be drawn from the intention of the Legiſlature, manifeſted by other parts of the Law, from the general purpoſe and deſign of the Law, and from the ſubject matter of it.

Whereas in the preſent Caſe, I will ſhew, 1ſt. an intention to include them, from other parts of this Law, from the general view and deſign of it, and from the nature of the Claim which is to be affected by it.

2d.—That this Act hath been expounded in ſuch a manner, ſoon after the making it, as to ſhew that the Bar doth not ariſe from the agreement of the Woman to a Jointure before Marriage; but from the energy and force of the Act of Parliament, ſubſtantiating the Settlement againſt her for this particular purpoſe.

3d.—That if it was doubtful, Uſage is the proper Decider of that doubt; and that the Uſage has been in favour of this Conſtruction.

4th.—That there are the greateſt Judicial Authorities for it; only one Caſe, which paſſed "ſub ſilentio," againſt it.

1ſt.—Moſt of the Women of great Families and Fortunes were married under age, and the Marriage of Infants was given, or ſold, like any other perſonal Property. The Legiſlature could not but know,

that

that a multitude of Wives, then exiſting, had been married under age. The 16th Section of the Act proves deciſively, that it did ariſe in their minds; for that Clauſe takes notice, for another purpoſe, of Heirs being within age or of full age, which ſhews that theſe different periods of time were then in their contemplation; and Infancy therefore muſt have ariſen in their minds as well as Coverture. Indeed, the idea of one diſability cannot preſent itſelf to the mind of a Lawyer, without the other. They are ſo connected together, and the conſequences ariſing from both, in many Caſes (not in all) are ſo exactly the ſame, that they will obtrude upon the imagination at the ſame time. And when there is a Proviſo qualifying the Bar in a particular inſtance, it is really equivalent to ſaying, "We mean the Bar ſhould "take place in all Caſes whatſoever, except in the inſtance we have "expreſsly provided for." And the Language of the Law upon this ſubject is, that in all Caſes of Statutes with Proviſos, they ſhall be taken generally, and in the moſt extenſive ſenſe, in all particulars, not reſtrained by the Proviſo, by force of the general words.

Earl of Buckinghamſhire againſt Drury.

If they had not thought the general words would have barred Femes Covertes, in reſpect of Jointures after marriage, it was a vain and uſeleſs Proviſo.

It was abſurd and ridiculous to take perſons out of the Act, who were not in it; but the Legiſlature, by this Proviſo, have in reality given their opinion upon this Queſtion—they have in effect ſaid, "the general words will extend to Jointures made upon perſons under all kinds of Diſabilities; but as that is not our intention, in reſpect of Jointures made after Marriage, we will take them out of the generality of the Law; but leave Jointures, before Marriage, to bar Dower in every other Caſe whatſoever."

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If it is ſaid, that this was only a Clauſe of caution; the ſame caution which produced the Proviſo in favour of Femes Covertes, would have extended to Infants, in caſe they had meant to give the ſame Election to both.

And Lord Hobart, in Sherley *v.* Wood, Hob. 71. underſtands the Law in this manner; his words are, "The Statute of Uſes hath a ge-"neral purview, that Jointures made for Wives, without diſtinguiſhing "before or after Coverture, ſhall bar Dower; and then comes a Pro-"viſo, that if it be made during Coverture, ſhe may refuſe it, and "take her Dower; which is a kind of remedy provided for her out "of the generality of the Law, and therefore muſt be pleaded by "her:" that is, a Feme Coverte is within the general words; and ſhe muſt take herſelf out of the general words, by bringing her Caſe within the Proviſo.

The Caſe put by Dyer in Plowd. 360. is very appoſite to this Caſe. The Statute of Fines, in 18 Edw. I. mentions Infants, and not Femes Covertes, which is the reverſe of this Caſe; and Dyer is of opinion, that becauſe Femes Covertes were not mentioned, they were bound by a Fine and Non-claim, under that Act.

This Proviſo relating to Jointures after Marriage, does not take a Feme Coverte out of the enacting Clauſe generally, as it would have done, if it had ſaid, "provided this Act ſhall not extend to Femes Covertes;" No—Femes Covertes were the objects of the enacting Clauſe. The Bar was created and oppoſed to them by the deſignation of married Women; and the Proviſo only removes the Bar, at their Election, in a particular Caſe; and therefore, even in reſpect of Jointures after Marriage, Femes Covertes are ſtill within the general words to every purpoſe whatſoever, but the ſpecial purpoſe

of

of making an Election whether they will take their Jointure or Dower.

Earl of Buckinghamſhire againſt Drury.

For ſuppoſe a Jointure is made after Marriage, and a Woman accepts it, and brings a Writ of Dower: if ſhe is not within the general words of the enacting Clauſe, ſhe muſt have both.

To another purpoſe a Wife, in reſpect of a Jointure after Marriage, is within the enacting Clauſe; for ſuppoſe ſhe was to elect her Jointure, and afterwards be evicted. If ſhe is not within the enacting Clauſe, ſhe is not within the Proviſo which immediately follows the enacting Clauſe, and gives the compenſation, viz. "provided that "if any ſuch Woman be evicted, ſhe ſhall have a compenſation." What Woman?——Every Woman having a Jointure mentioned in the enacting Clauſe, and no other; and therefore, unleſs the enacting Clauſe includes a Woman, in reſpect of a Jointure after Marriage, ſhe could have no compenſation out of the reſidue of her Huſband's Eſtate, upon an Eviction of all or any part of her Jointure made after Marriage.

If Infants were not included in the general words of this Law, they muſt have been entitled both to their Settlements and Dower; for this is the only Clauſe in the Act which can take that Common Law Right from them; and if an Infant elects a Jointure made after Marriage, and is evicted, ſhe is not within the compenſating Proviſo, unleſs ſhe is within the general words of the enacting Clauſe; for it can extend to no other.

But to avoid that inference, which proves too much, it has been ſaid that Women may be ſo far included in theſe words, as to prevent their being entitled to both their Jointures and Dower; yet ſtill it muſt

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muſt be underſtood to leave them to that right which the Common Law gives them, of diſagreeing to theſe Eſtates when they came of age: that even before this Act of Parliament, they were not obliged to take the Eſtates limited to them by theſe Settlements, "ex proviſione viri;" and that it would be a moſt harſh and ſevere expoſition of this Statute to take away a right, which they had, of refuſing thoſe Settlements.

But if they are included in the general words for one purpoſe, they muſt be included for every purpoſe to which the Proviſion of that Clauſe extends. And I do not contend that this Clauſe takes away the right which Infants have of diſagreeing to their Settlements after the death of the Huſband. They might diſagree to them after this Act if they pleaſed, as they might have done before the Act; but ſtill the Statute gives theſe Settlements the energy of a Bar.

It was the exiſtence of a Settlement made before Marriage at the time of the Act, and of a Settlement made before Marriage ſince the Act, which conſtitutes the Bar within the meaning of this Act of Parliament.

If the Settlement exiſted at the time, the Bar attached the inſtant the Act paſſed. The right of Dower was that moment annihilated, as to all Women who were then living, and had Jointures made before their Marriage. To this purpoſe the Statute impregnated the Settlement with the quality of a Bar, which could not be varied either by accepting or refuſing the Settlement afterwards.

And when a Settlement was made after the Act, before Marriage, the right of Dower never ariſes. The Statute interrupts the right: there is no inchoation of it by the Marriage. In that particular it

is

is a Repeal of the Law of Dower; it is ſaying that a Marriage ſo circumſtanced ſhall have no effect "quoad dotem:" it is as much a Plea in Bar as "never coupled in lawful Matrimony." Earl of Buckinghamſhire againſt Drury.

But it may occur, that a Jointure, when refuſed, is void "ab initio;" and therefore, that the Wife, in that caſe, is not a Woman having a Jointure, when ſhe claims her Dower:

When an Eſtate is refuſed, it does not become void to all intents and purpoſes, as if it had never been: for ſuppoſe an Eſtate conveyed to a Feme Coverte, or an Infant, and the Grantor afterwards makes his Will, and deviſes it, and the Feme Coverte, or Infant, afterwards refuſes; the Will of the Grantor will not be good. Butler and Baker's Caſe, 3 Co. 25.

But ſuppoſe it was void at Common Law, yet a Statute may give it a being and an effect for a particular purpoſe, and at the ſame time leave it, for every other purpoſe, to all the conſequences which it would have had, if the Act had never been made.

If ſhe had a Jointure when the Act paſſed, or, ſince the Act, has a Jointure at the time of the Marriage, and may take that Jointure if ſhe pleaſes; the Act has drawn the line upon her, and ſays ſhe ſhall have no choice. For the Act is not, "every Widow having a Jointure when ſhe demands her Dower;" but, "every Woman married having ſuch Jointure made or hereafter to be made;" and a Jointure which had been limited to an Infant before Marriage, was a Jointure made, and ſo effectually made, that ſhe could not diſagree to it till her Huſband died; and in that reſpect differs widely from a Conveyance made by an Infant of her own Eſtate, which ſhe may avoid at any time.

All

Earl of Buckinghamſhire againſt Drury.

All Books, which treat of Dower, ſpeak of it as an inchoate, inceptive, initiate right, given by the Marriage, and conſummated by the death of the Huſband.

The death of the Huſband does not give it, but completes it; and if a Settlement before Marriage prevents the right from ever beginning, the death of the Huſband cannot conſummate what never began; much leſs a Refuſal, which muſt be poſterior to the death of the Huſband.

The Caſe, put at the Bar, of a Fine levied of a Jointure made before Marriage, and of one made after Marriage, is in point to ſhew, that the Bar is created by the Settlement in the one caſe, and by the Acceptance of it in the other. If a Fine is levied by Huſband and Wife of a Jointure made before Marriage, the Wife cannot claim Dower in the reſidue of her Huſband's Eſtate; but if it is levied of a Jointure made after Marriage, ſhe may.

What is the reaſon of the difference? becauſe the right of Dower had never exiſted in the one Caſe, but it had in the other; and nothing could bar it but Acceptance, which could not be till after the Marriage, and then there was nothing to accept.

And is it to be conceived, that when the Legiſlature was forming a Law of ſuch importance to the Public, which was to be, and really has been, and now is, the baſis of all the real property in the Kingdom, and they were conſidering the conſequence of that Law in reſpect of married Women, (and in the Caſe of Women, married Infants muſt have occurred) they ſhould leave ſo many married Women upon a virtual Exception in one Caſe, and guard them by an expreſs Proviſo in another?

Earl of Buckinghamſhire againſt Drury.

It is very material to obſerve, that this Act of Parliament, even in its great and principal object, the union and conſolidation of the legal Eſtate and the Uſe, takes into its graſp Infants, as well as adult Perſons, in general Words: the words are, "where any perſon or perſons ſhall be ſeiſed to the uſe of any perſon or perſons." Suppoſe the legal Eſtate had at that time deſcended upon an Infant, and the Uſe at that time were in an Infant: this parliamentary Conveyance would certainly have taken place, in ſuch a Caſe, exactly in the ſame manner as if they had been of full age, or an Act had paſſed in any particular Caſe enabling one Infant to convey to another.

Upon what foundation would ſuch a Conſtruction have been made? Becauſe the words in their proper and ordinary ſignification comprehend Infants; and there was the ſame reaſon to unite the legal Eſtate and the Uſe in the caſe of Infants, as of adult Perſons.

But it may occur, that in ſuch a Caſe there could be no prejudice: it was only veſting the legal Eſtate where in equity and conſcience it ought to be.

Anſwer:—1ſt. It ſhews that the Act was dealing with Infants by general words.

2d. That no prejudice could ariſe to Infants, by giving their Settlements the effect of a Bar, which the Legiſlature did not intend in the caſe of adult Perſons.

What was the reaſon of making a Jointure before Marriage bar Dower, and not letting Dower bar the Jointure? They found an infinite number of Eſtates at that time under Settlements, with Limitations made by Huſbands and their Anceſtors to Wives in Tail, becauſe that was the ſtricteſt Settlement which the Law then knew.

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The injuſtice of repealing theſe Settlements, which are domeſtic Family-Laws, adapted to the circumſtances and exigencies of every particular Family, muſt have determined them in a moment not to lay the leaſt foundation for breaking in upon them; and as they could be made from no other motive but a deſire to ſecure a proper Proviſion for Wives ſurviving their Huſbands, the Legiſlature ſaw there could be no hardſhip in refuſing them a choice of Dower, in oppoſition to their Settlements; and though Dower in their Huſbands Eſtate (even before the union effectuated by this Act, but particularly after this Act) might, in ſome particular inſtances, be more valuable than the Eſtates provided for them by theſe Settlements; yet this inequality, in particular inſtances, was moſt amply compenſated to the Sex in general, by putting ſuch an infinite quantity of Property within the reach of Dower, where no particular Proviſions had been made for them. "Nulla Lex ſatis commoda omnibus eſt— "id modo queritur, ſi majori parti et in ſummâ re prodeſt."

The Rule laid down by the Legiſlature was this: let Women, who have no Settlement, take their Dower in all their Huſbands Eſtates, whether thoſe Eſtates were veſted in them before this Act or by this Act: but let the Women, who have Settlements made before their Marriages, acquieſce under thoſe Settlements, and abide by the Proviſions which have been thereby made for them, whether they are great or ſmall, adequate or inadequate; whether they have been made by the Agreement of themſelves or their Friends, or have been the mere ſpontaneous Acts of the Huſband or his Anceſtors.

The Objection of Fraud, ſo much relied upon, does not exiſt, as applied to a Settlement made before the Act; for a Settlement could

not be made to bar Dower fraudulently, when it could not be made to bar it at all.

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But (it is ſaid) though it could not be made fraudulently to bar Dower, yet the Wife might have diſagreed to the Settlement, and have refuſed to accept the Eſtate given to her by it.

It is a very foreign ſuppoſition, that an Eſtate ſhould be limited to her for a Proviſion not worth her acceptance, when ſhe could loſe no other advantage by accepting it; but ſuppoſe it was "damnoſa Hæreditas," did the Legiſlature mean to take away her right to diſagree, and force the Eſtate upon her, "nolens volens?" Certainly not. She might agree or diſagree to the Settlement, juſt as ſhe might have done before the Act; but the Bar, which the Act has given to the Settlement before the time of agreeing or diſagreeing comes, cannot be avoided by her refuſing to accept it. It is the Will of the Legiſlature, acting upon Settlements then exiſting, which conſtitutes the Bar, and not the agreement to thoſe Settlements.

Suppoſe inſtead of making theſe Settlements a Bar of Dower, they had given Women a right to elect, to take which they would, what would have been the conſequence? It would have put it into the power of every Woman in the Kingdom, where the Eſtate was limited to her in Tail, to have defeated the Limitation to the Iſſue, and thereby to overturn the ſtricteſt Settlements which were then exiſting, or could then have been made: for ſhe could not refuſe for herſelf only; becauſe the Eſtate Tail being to veſt in her, either totally or not at all; if ſhe refuſed to accept the Eſtate Tail, it muſt vaniſh as to the Iſſue; and wherever the Dower was more valuable than the Eſtate limited by the Settlement, ſhe would have been balancing the difference, and tempted to make an Election of her

Earl of Buckinghamſhire againſt Drury.

Dower; and the Iſſue who were Purchaſers for a valuable Conſideration under their Father, as well as their Mother, muſt have loſt the Eſtate.

To illuſtrate my meaning by an inſtance—By a Settlement before Marriage, an Eſtate ſtands limited to the Huſband and Wife, and to the Heirs of the body of the Wife by the Huſband to be begotten, leaving the Reverſion with the Huſband. The Huſband ſells the Reverſion, or limits it over to his Brothers or other collateral branches of his Family, and dies, leaving Iſſue. The Wife ſurviving ſays, "I "was an Infant when this Settlement was made, and therefore I "will refuſe the Eſtate given by this Settlement, and have my Dower "out of the whole Eſtate." What would have been the conſequence? The Iſſue of the Marriage would have been diſinherited, and the Eſtate gone to ſtrangers, or to the collateral branches of the Family.

Did the Legiſlature intend to leave this right in an Infant any more than in an Adult? When the Settlement was made, it was thought to be a proper Proviſion.

Women may accept or refuſe their Jointures as they pleaſe; but if they do refuſe them, they ſhall not have Dower; and when that temptation was taken out of their way, there was no danger of their defeating the Limitation to the Iſſue of the Marriage by a refuſal.

It is ſaid that the motive which induced the Legiſlature to give Femes Covertes an Election, in reſpect of Jointures after Marriage, was becauſe they were "ſub poteſtate viri," and incapable of contracting:—that Infants are equally incapable, and therefore ought to have the right of Election.

That is ſaying in ſo many words, that a perſon to whom no right is given by the Act to elect, ſhall be in the ſame ſituation as a perſon

to

to whom a right is given by the Act to elect; which is in reality to deſtroy the diſtinction which the Proviſo in this Act has made and eſtabliſhed. Earl of Buckinghamſhire againſt Drury.

Suppoſe the incapacity of contracting to be the reaſon for giving an Election in the Caſe of a Jointure after Marriage, and this Objection had been made at the time of paſſing the Act. "You give "Femes Covertes a choice as to Jointures after Marriage: why do "not you give Infants a choice as to Jointures made before Mar- "riage? They are equally incapable of contracting." The plain and obvious anſwer muſt have been, "The caſes of an Infant before Marri- "age, and of a Woman after Marriage differ moſt eſſentially: a Feme "Coverte is under the abſolute controul of her Huſband: he would "be contracting with himſelf. The principal contract, the Marriage, "is paſt; and by that Marriage the Wife has acquired an inceptive "right of Dower, which he ſhall not take from her. But an Infant "is not under the controul of the Man, before ſhe has married him. "She is under the controul of her Parents or Guardians; and, though "a Marriage without their conſent cannot be reſcinded, yet the Law "expects and requires their Conſent, and puniſhes all Marriages con- "tracted without it."

"Settlements are made by the interpoſition of Parents and Guar- "dians. They are the perſons whom the Law appoints to direct "the Infants in theſe ſtipulations, and to oppoſe to the intended "Huſband. "Ad ea quæ frequentius accidunt, Jura adaptantur." A "Marriage, without their Conſent, would not have entitled the Wife "to Dower: for though the Eccleſiaſtical Law did not reſcind the "Contract, becauſe it could not reſtore her to what ſhe had loſt by "the execution of it, yet the Biſhop would not have certified ſuch a

"Marriage

Earl of Buckinghamſhire againſt Drury.

" Marriage to be " legitimum Matrimonium." It was not a Con-
" tract to affect a right which ſhe then had, as is the caſe of a Join-
" ture made after Marriage; but it is a contingent right merely,
" which ſhe is to derive through a Contract, which the Law enabled
" her to make. Her own Eſtate is not affected by it."

" Conditions, expreſs or implied, bind Infants. This is a kind of
" Condition annexed by the Huſband to the diſpoſal of himſelf. If
" ſhe takes him, ſhe ought in juſtice to abide the terms on which ſhe
" accepted him: She ought not to retain the benefit of the Contract,
" and then reject the Condition upon which the Huſband entered
" into it."

" We find an Infant competent to the principal Contract; and
" therefore will conſider her competent, as to this precedent Contract
" which induced the Huſband to enter into it."

" By giving the Wife a right of Election in the caſe of a Jointure
" after Marriage, we leave the Huſband's Eſtate exactly in the ſame
" ſituation as when the Settlement was made, ſubject to the right of
" Dower which the Marriage had given; but by giving a right to
" elect Dower in the other Caſe, we ſhould ſubject the Huſband's
" Eſtate to a right which it was not ſubject to when the Settlement
" was made, and which he might have effectually prevented at that
" time, either by not marrying her at all, or keeping his whole Eſtate
" out of the reach of that right. And the Law makes an eſſential
" difference between the privilege of Infancy, in reſpect of Rights
" veſted in Infants, and a Title to things which never were veſted
" in them."

If an Infant had Title to enter for Mortmain, and did not enter within the year; or if he did not enter into lands purchaſed by his Villein

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Villein before the Villein had aliened them; he could not enter afterwards in either caſe; for there he had nothing but a title to a thing which never was in him. Plo. 364. b.

Though the Common Law ſays, "that perſons muſt treat with Infants at their peril; becauſe they will be bound by the Contracts "they make with them, and Infants retain their right of avoiding "them;" yet that regards only Contracts affecting their own original property, not meaning that they ſhould derive an intereſt out of the property of another perſon. It would be a Fraud upon the Huſband; and the Caſe cited at the Bar out of 2 Leon. 108. Piggot and Ruſſet, is a ſtrong inſtance that Infancy ſhall not protect a Fraud; and that an Infant may, by his own aſſent, preclude himſelf of a contingent Right even in his own Inheritance, viz. "If Tenant for Life, being "of full age, and he in Remainder within age, levy a Fine, and afterwards the Infant reverſes the Fine as to him, for the Inheritance, "he ſhall not enter for the Forfeiture, becauſe he joined in the Fine, "and ſo aſſented to it."

Upon what principle does this Caſe ſtand? If a Tenant for Life levy a Fine, it is a Forfeiture; and when the Tenant had reverſed it, it was totally void as to him, "ab initio," and as if it had never exiſted; and yet the ſame reaſon might have been urged which is offered in the preſent Caſe.

He could not preclude himſelf of this Right of Entry for the Forfeiture. The Law gives him as good a Right to enter upon ſuch an Alienation, as if the Tenant for Life had died. It is a contingent Right which every Reverſioner or Remainder-Man has in the Eſtate; and an Infant can by no Act prejudice ſuch a Right. But the Common

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mon Law ſays, he ſhall be bound by his Aſſent, as he had been a Party to the Act under which he would derive his Right.

I have not been conſidering what the Law would have been, independently of this Act of Parliament, but mentioning ſuch reaſons as diſtinguiſh the Caſe of an Infant, before Marriage, from a Feme Coverte, and ſhew the juſtice of the Legiſlature in making a difference between Infants jointured before their Marriage, and Women jointured after their Marriage, and oppoſing the Bar to one, and relaxing it in favour of the other.

The difference ariſes from the different ſituation the Parties were in at the time of making theſe Settlements.

The Legiſlature would not take away a Right which the Wife had acquired by her Marriage; but they would hold her to a Settlement made when ſhe had no Right at all.

It may perhaps occur, that a Right of Election is given to waive a Settlement after Marriage, and yet a Settlement after Marriage could no more be fraudulent before the Act, than if made before the Marriage; and the Right of the Iſſue may be defeated by an Election of Dower in that caſe as well as the other. It is true it could not be fraudulent; but it differs widely from a Settlement before Marriage in another reſpect. By a Settlement before Marriage, the Iſſues of the Marriage are Purchaſers for a valuable Conſideration under their Father's Marriage, as well as their Mother's; but in Caſe of a Settlement made after Marriage, the Settlement is merely voluntary, and the Iſſue not entitled to the ſame protection.

Perhaps it may be ſaid, that though a Settlement could not have been made fraudulently before the Act, yet it might after the Act.

If

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If this objection of Fraud had any weight in it, which I ſhall ſhew it has not, it might have been a reaſon for laying down different Rules as to Jointures then made and afterwards to be made; but it cannot warrant us to lay down two Rules, when the Act has only laid down one.

I muſt repeat the poſition again in this place: that this Caſe muſt be determined exactly in the ſame manner, as if it had been the Caſe of an Infant married at the time of the Act; and then how would the Argument have ſtood? The poſſibility of a Fraud to come, ſhall defeat a Settlement made when there was no poſſibility of any Fraud at all.

This leads me to the Caſe of a pocket Jointure, or a Jointure made fraudulently to bar Dower, which ſeems to have been the moſt plauſible Objection in this Caſe; but when it comes to be examined cloſely, will appear not to have the leaſt weight in it: for a Jointure made fraudulently, to bar Dower, is not the Jointure which the Law acknowledges and ſanctifies. It muſt be a "competent Livelihood of Freehold, for the life of the Wife." The pattern and model of the Jointure to be made, is given by the Act. It muſt be ſuch a Jointure as was made before the Act. What was that? a Jointure without Fraud; becauſe a Jointure before the Act could not have the leaſt ſhade of Fraud in it.

A copy after that original is what the Law means by a Jointure: But can the Common Law examine this Fraud? Competency is a very vague indefinite term: How is the line to be drawn with reſpect to this competency? How! as in all other Caſes whatſoever—by a Jury, under the direction of the Court which tries it.

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The circumſtances of the Parties, their rank and quality; the proportion of the Jointure to the quantum of the whole Eſtate; the conſent of Parents or Guardians in aſcertaining it; and every Fact which ſhews the tranſaction fair, and every Fact which ſhews it fraudulent, muſt be laid before the Court to direct their judgment upon it.

A pocket Jointure, made upon a Woman without her privity, or upon an Infant with her privity, without the interpoſition of Parents or Guardians, would be ſuch an evidence of Fraud, as would be ſufficient to condemn it; and it is not without a Precedent in the Common Law, that the validity of the Act of an Infant ſhould depend upon the fairneſs of it: for if an Infant makes a Partition, and it is equal, it will bind him; if it is unequal, it will not. Co. Lit. 171. The validity of the Partition depends upon the fairneſs of it.——A beautiful inſtance of the care the Law takes of Infants with reſpect of their own property, by making it the intereſt of the Party, who treats with them, to do them complete juſtice.

The Caſe ſuppoſed would want no Trial at all; for it would be Fraud apparent, like the Caſe put in Hardres, 56. Attorney General *v.* Shirt. "The King was entitled to one Tun out of every ten Tuns of Wine imported. A merchant imported nine Tun and a half. The King demanded and had a Tun.—The Court ſaid it was Fraud apparent, without proof."

It would be endleſs to enumerate inſtances where the Common Law takes notice of Fraud, and annuls acts done from ſo vicious a motive.

If the Common Law had not ſtrength and activity enough in it to condemn an act founded in iniquity, it would ill deſerve the character

Lord

Lord Coke gives of it, who ſays, "that it has been fined and refined by an infinite number of grave and learned men, and is the perfection of human reaſon:" whereas, if it was incompetent to ſuch a Queſtion, I ſhould think it had been fined and refined out of all its ſpirit, and was the *corruption* of human reaſon.

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I will mention two or three Caſes upon this head, and allude to twenty. 3 Co. 77. Fermor's Caſe.—A Leſſee for years, and at will, of Freehold Eſtates, and alſo a Copyholder of Lands lying in the ſame Town, had alſo Lands of Inheritance lying in the ſame Town; and by a Deed he conveyed all the Leaſehold and Copyhold Lands to a man for his Life, and then levied a Fine of ſo much Land in quantity as would comprize the Leaſehold and Copyhold, as well as his own Inheritance, by Covin and Practice to bar the Leſſor of the Inheritance of the Leaſeholds and Copyholds.

Five years elapſe, and the Leſſee continues in poſſeſſion, and keeps paying his Rent to the Leſſor. The Grantee of theſe Eſtates dies, and the Leaſe for years expires, and the Leſſee would then have ſet up the Fine, and five years Non-claim, to have barred his Leſſor.

The Book ſays, that the Caſe, being of great importance and conſequence, was referred to all the Judges: and what did they ſay? Though the Fines are the general Aſſurances of the Realm, and the Act of Hen. VII. has declared that they ought to be of the greateſt ſtrength; yet the Legiſlature never intended to eſtabliſh a Fine levied by Fraud and Practice, and therefore it was held no Bar, by all the Judges. The Statute of Hen. VII. intended to make a Fine and Non-claim a complete Bar; but not a Fine levied fraudulently to cheat people.

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So this Statute intended to make a Jointure a complete Bar; but it muſt be a Jointure to ſupport and maintain a Wife, and not a Jointure made fraudulently to cheat and ſtarve her.

In Fermor's Caſe, there is a variety of inſtances where the Common Law takes cognizance of Fraud, and avoids almoſt all kinds of acts when they are infected with that poiſonous ingredient.

A perſon in cuſtody for Felony may, before Conviction, "bonâ fide," and for a valuable conſideration, diſpoſe of his perſonal Eſtate. A perſon in that ſituation made a Bill of Sale of his Goods, to make a Proviſion for his Son. He was afterwards convicted, and the Sheriff ſeized the goods contained in the Bill of Sale, as forfeited. The Son brought an Action againſt the Sheriff for the Goods; and Holt, Chief Juſtice, ſaid, that there was a Fraud at Common Law, in ſuch a Caſe as that was; and that ſuch a Conveyance could not be intended to any other purpoſe than to prevent a Forfeiture, and defraud the King.

So I ſay, in Holt's words, that ſuch a Conveyance, as has been ſuppoſed at the Bar, cannot be intended for any further purpoſe than to defraud the Wife: and I will only mention one other inſtance where the Law controuls very legal acts, if the manner of obtaining them has been fraudulent.

An Aſſignment of Dower by a Diſſeiſor ſhall bind; but if the Widow hath colluded with the wrong-doer, it ſhall not, becauſe the Covin ſhall ſuffocate the Right, and ſo the wrongful manner ſhall avoid the matter that is lawful. Co. Lit. 35. a.

But perhaps it will be aſked, how is this Fraud to be come at? Is there any Precedent to be produced of deducing ſuch a Queſtion

of

of Fraud before a Court of Law?—No ſuch Caſe has ever yet exiſted; but when it does exiſt, a way will very eaſily be found to get at it.

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Pleading is only telling with accuracy and preciſion what the Law is; and if the Law ſays an act done to defraud ought to have no legal effect, there ſeems to be no great myſtery in ſaying ſo, either by a ſpecial Plea, or upon ſome general Iſſue.

For inſtance, a Writ of Dower is brought, the Tenant pleads a Conveyance made before Marriage of particular Lands to the Wife for her Jointure. The Plaintiff might reply, that it was made by Fraud; and upon a general Iſſue of "Fraud or not Fraud," the whole might come before the Court under ſuch an Iſſue; or the Plaintiff might reply the ſeveral Facts which evidence the Fraud, and the Caſe be brought before the Court upon a Demurrer.

But taking the Caſe put in its fulleſt extent, it is doing no more than what is practiſed every day in effect, by putting the Eſtate into Truſtees, and taking joint Purchaſes after Marriage to prevent Dower; and a ſtrict Settlement made before Marriage, with a power of Revocation, will prevent Dower, and, at the ſame time, preſerve to the Huſband an abſolute dominion over the Eſtate; and therefore, all the Objection of prejudice to Infants, as the Law now ſtands, vaniſhes in a moment: for what detriment can it be to Infants to preclude them from Dower, by a ſmall Eſtate, when they may be equally precluded from it without giving them any Eſtate at all?

Another reaſon againſt giving a right of Election to a Woman when ſhe came of age is, that the Right muſt remain in ſuſpenſe until that time, both in the Caſe of a Jointure made upon an Infant before Marriage, and after Marriage.

For

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For ſuppoſe the Huſband dies, leaving an Infant Wife: ſhe brings a Writ of Dower, and the Jointure is pleaded in Bar—and Infancy is replied. She is not to have both—Which is ſhe to have during her Infancy?

If the Jointure is good, and bars till diſagreed to, there muſt be Judgment againſt her in the Writ of Dower: and if ſhe diſagrees to Jointure, and avoids it "ab initio," how is ſhe to get at her Dower when ſhe comes of age? for there is a Judgment in Dower againſt her. And if ſhe does not ſue a Writ of Dower, but takes poſſeſſion of her Jointure, is the right of Dower, ſaid to be conſummated by the death of the Huſband, to be turned by a conſtruction of this Act into a contingency, and lie in ſuſpenſe till the Infant comes of age, and be totally uncertain whether it ſhall ever exiſt at all?

This Queſtion is determined in a Book, publiſhed in the year 1632, called the "Laws and Reſolutions of Womens Rights." There is a Section in that Book with this Title:

"What is a ſufficient Refuſal or Agreement of or to a Jointure made after Coverture?" And there the Caſe is put: "if ſhe bring a Writ of Dower, and declare upon it, this is peremptory, although ſhe be under age, Coverte or not Coverte of a ſecond Huſband; for the Law ſaith, that they which have diſcretion to acquire and get things, have ſufficient diſcretion to give and preſerve thoſe things gotten. Therefore, if an Infant come to any thing by Purchaſe, he ſhall not in that have any advantage, or be in better plight than a perſon of full age." And the ſame Book enumerates many inſtances of Infants being bound by their own Elections.

An Eſtate to an Infant of two acres, the one for Life, the other in Fee: Feoffment of one, though under age, is a ſufficient Election.

If Rent be given to an Infant, and he bring Writ of Annuity: his Election is determined, and he ſhall not avow as for a Rent when of full age.

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If Infant recovers Debt, and ſues an Execution by Elegit, it ſhall bind him.

And when Littleton, who is ſo very correct a Writer, ſays, Sect. 41. that if after the deathof her Huſband, the Widow enter and agree to Dower, "ad oſtium Eccleſiæ," or, "ex aſſenſu patris," then ſhe is concluded claiming any other Dower; it muſt be intended of an Infant, becauſe in the Section next but one preceding, where he does not intend to include an Infant, he expreſſes himſelf, and correctly ſays, "where a man of full age endows;" and in 47th Sect. he puts the Caſe of a man ſeiſed in Fee Simple, being within age.

The different form of pleading a Jointure made before and after Marriage, is extremely material to prove, that it is the act of the Huſband which makes the Bar in the one caſe, and the ſubſequent Agreement of the Wife which makes the Bar in the other.

Where the Jointure is made after Marriage, and is pleaded in Bar of Dower, there is an Averment that ſhe accepted it. But when the Jointure is made before Marriage, Acceptance is not pleaded at all.

In the Caſe in Co. Ent. 172. the Wife is not ſo much as a Party to the Deed of Jointure, and ſhe is ſo far from availing herſelf of her not being a Party or Privy to the Deed, that ſhe replies there was no ſuch Deed; which is an implied admiſſion, that if there was ſuch a Deed, ſhe was bound by it.

In 2 Brownlow, 181. Acceptance is not pleaded. "Doctrina placitandi," 149. "If an Eſtate is made to the Wife, before the Cover-
"ture or afterwards (if ſhe after the death of her Huſband enter and
"agree

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" agree to it) for the term of her own Life, or for a greater Eſtate, " this is a Bar."

Theſe Rules are extracted out of legal Principles, and are the pith and marrow of the Law. The Entry and Agreement, after the death of the Huſband, can relate only to the Eſtate made after Marriage; becauſe in the Caſe of an Adult agreeing to a Jointure before Marriage, it is admitted that Acceptance after the Huſband's death is not neceſſary; and as the Rule is laid down generally, it muſt be underſtood as generally to compriſe an Infant as well as an Adult, or otherwiſe ſo accurate a Book as that is, would have taken the diſtinction.

2d.—I will now ſhew that this Act has been expounded in ſuch a manner, as to prove that the Lien or Bar doth not ariſe from the Agreement of the Woman; but from the energy and force of the Act of Parliament, ſubſtantiating the Jointure made by the Huſband.

Between the 27 Hen. VIII. and 13 Eliz. which was about the ſpace of thirty-five years, it appears that it had come in Queſtion before the Judges, whether a Woman could refuſe a Jointure made before Marriage?

In Plowden, 396. Lord Leiceſter's Caſe, which was in the 13 Eliz. (before Vernon's Caſe, which was in 14 and 15 Eliz.) Anderſon ſays, " the Act of 27 Hen. VIII. c. 10. which enacts, that Women ſhall " not have Dower where Lands were aſſured to them and their Huſ- " bands for a Jointure, has a Proviſo, that if any Feme has Lands " aſſured after Marriage to her for Life, that then ſuch Feme may " at her liberty, after the death of her Huſband, refuſe to have and " take the Lands ſo aſſured to her for her Jointure, and demand her " Dower. And becauſe that the words are, " Aſſurance after Mar-

" riage,"

" riage," it had been taken, that if the Aſſurance be before Mar- " riage, that ſhe ſhall not refuſe; for by the Implication of the " words, the Judges have taken the intention of the Makers of the " Act to be ſo."

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In what Caſe, or how long before that time, the Judges had put that conſtruction upon the Act, does not appear; but it muſt have been in leſs than thirty-five years ſince the making of the Act.

This Queſtion, and the Determination upon it, muſt have ariſen upon a Caſe where the Woman had not previouſly accepted the Jointure: for if, previous to the Marriage, ſhe had accepted it, no Queſtion could have ariſen whether ſhe was bound by it. It could never be a doubt whether ſhe could refuſe what ſhe had once accepted. And though this is to be underſtood of a Woman of full age, yet, if the Agreement of a Woman of full age is not required by the Law to conſtitute the Bar, the Argument, drawn from the incapacity of an Infant to agree, or the privilege of an Infant to diſagree, falls intirely to the ground.

4 Co. 3. a. Vernon's Caſe. It is ſaid, " that a Woman cannot, after " the death of her Huſband, waive a Jointure made before Marriage, " and this by force of the Proviſo." And 1 Inſt. 36. b. Lord Coke lays it down, that a Jointure made before Marriage was not waivable at all.

And the poſition is echoed through all the Books which ſpeak upon this ſubject, ſo emphatically, that it muſt be meant of a Jointure which had not been previouſly accepted: for there was no occaſion to raiſe Judges from their graves to tell us, that a Woman could not refuſe what ſhe had once accepted.

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But ſuppoſe the Conſtruction only doubtful, what is the Rule? Uſage is the beſt Decider of the Doubt. "Optimus Legum interpres eſt conſuetudo." Where the penning of a Statute is dubious, long uſage is a juſt medium to expound it by. Lord Vaughan, 169.

3d.—As to the Opinion of the Conveyancers of the preſent age, though as able as any who ever lived, yet it has not been laid before us with that certainty which it ought to be, if our Judgment were to be directed by it.

I prove the Opinion of Conveyancers for two centuries by this medium: it is now about two hundred years ſince the Statute of Hen. the VIII. was made.

That Jointures have, in fact, been made upon Infants before Marriage, ever ſince the Statute, and for many years paſt under the direction of the Court of Chancery, is a fact too notorious to be diſputed: every great family in the Kingdom is in poſſeſſion of ſuch Settlements, and yet there is not one ſingle inſtance where they have ever been diſputed.

In ſome inſtances Wives might die before their Huſbands: in others, the Jointure might be more beneficial than the Dower; but there muſt have been many hundreds where it was otherwiſe: and if it could be conceived that there never has been an inſtance where the Jointure has been of leſs value than the Dower, there is no reaſon to diſturb the Uſage, from the apprehenſion of a Fraud which has never been practiced.

If there have been inſtances of Jointures inadequate to the Dower which Wives would have been entitled to, and thoſe Jointures have

never been rejected, and Dower reſorted to, it ſhews the ſenſe of two Centuries upon the Queſtion. Earl of Buckinghamſhire againſt Drury.

The Practice proves the Opinion; and the uninterrupted acquieſcence under the Practice proves the rectitude of the Opinion.

4th.—As to Authorities, the Caſes of Price and Seys *(a)*, and Harvey and Aſhley *(b)*, are in point: I heard them both, and took a very particular Note of the latter *(c)*; but for fear of any miſtake, I have the

(a) Barnard. Ch. Ca. 117.

(b) 3 Atk. 607.

(c) The following Note of this Caſe of *Harvey* v. *Aſhley*, is taken from Mr. Juſtice WILMOT's MSS.

Harvey and Dorothy his Wife, againſt Aſhley and his Wife and others.——The Plaintiff Dorothy being fifteen years of age, and entitled to £. 5,000 under her Grandfather's Will, if ſhe married with the conſent of her Mother, and to other contingent and future Proviſions, married Mr. Pitfield her Couſin-german. Previous to the Marriage, a Settlement was made, dated 29th of June 1737, between Mr. Pitfield, Mr. Aſhley and his Wife, the Truſtees, and the young Lady, Dorothy, whereby Mr. Pitfield's Eſtate was ſettled in ſtrict Settlement, the other part being already ſettled; the £. 5,000 is agreed to be paid, and to be applied to exonerate a part of Mr. Pitfield's real Eſtate; there was alſo a contingent proviſion of £. 3,000, which Dorothy was entitled to, and agreed that one moiety ſhould be paid to Mr. Pitfield, and the other moiety ſold: and an Agreement was alſo made for ſettling another part of Dorothy's perſonal Eſtate, which ſhe was entitled to under the Will of her Grandfather; the £. 5,000 was paid, and £. 4,000 more of her perſonal Eſtate was applied in paying off the incumbrances affecting the Eſtate of Mr. Pitfield. There was Iſſue only one Child of the Marriage, Mary, an Infant: in Auguſt 1740, Mr. Pitfield died. December 1740, Dorothy married Harvey; June 1743, attained twenty-one; 10th January 1745, the Bill was brought to ſet aſide the Marriage Settlement, and for other Purpoſes.

" Lord Chancellor (HARDWICKE):

" The firſt point is, Whether the Plaintiff Dorothy, and Mr. Harvey in her right, are " bound by this Marriage Settlement, by the original nature and force of the Agreement " taken abſtractedly."

" The firſt Objection is, That Dorothy was an Infant, and could only be bound by her " Election, and that no other perſons could bind her properly by their Contract. But " Marriage Agreements differ from all others. The principal Contract is the Marriage; " and an Infant Female may contract at the age of twelve. All the other parts of the

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the Notes taken of thoſe Caſes by the late Lord Chief Juſtice RYDER, whoſe judgment, accuracy, and fidelity to his Clients, were as eminent as in any Advocate who ever yet exiſted. And in the Caſe of Price and Seys, he ſtates, that the point was argued at the Bar, and that the Lord Chancellor (HARDWICKE) ſaid, "it was clear in Law, that if a man married, and before Marriage, in conſideration of it, and

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"Contract are collateral incidents, entered into to ſecure ſome proviſion for the Party "marrying and the Iſſue, and may be greater or leſs according to circumſtances."

"As ſoon as the Marriage takes place, the principal Contract is executed, and cannot "be ſet aſide or reſcinded; the ſtate and the capacities of the Parties are changed, and "Children born, or to be born, are Purchaſers under it; Purchaſers both under their "Father and their Mother; therefore it was admitted by Mr. Wilbraham, that the "Court would take care how they broke in upon Settlements, made on the Marriage "of Infants; becauſe the principal Contract being good and not reſcindable, it may "affect the Iſſue of the Marriage, and the rights of third perſons, to avoid them. On "this ground it is, that the difference has always been obſerved between the execution "of other Agreements in ſpecie, and of Marriage Settlements."

"Other Agreements are entire; if either Party fail, no Execution ought to be in "ſpecie; but in Marriage Agreements, though the Father or Mother, or the Friends of "either, do not perform them, the Children are entitled to call for a performance from "the other Party, becauſe they are Purchaſers from both; the Court may lay their "hands on the Father or Mother's Eſtate or Intereſt in the thing ſettled to make it "good."

"But if this Court ſhould interpoſe to ſet aſide, or give relief againſt, any part of a "Marriage Settlement, it muſt relieve againſt and avoid the whole: for every part "makes the Conſideration of the whole of every thing; and it is impoſſible, where there "is no Fraud, to ſay this part is unreaſonable; you have gained too much on one ſide, "and therefore that ſhall be deducted. This makes it a different bargain, and, in conſe-"quence, the Uſes of the Eſtate muſt be broken in upon on the other ſide. Nay, in the "preſent Caſe, the Intereſt of the Plaintiff Dorothy may be greatly concerned. If ſhe "takes back any part of her Fortune, ſhe muſt waive and renounce her Jointure, and "the Limitation of the Fee to herſelf."

"Conſider what may be the conſequence—her Mother dies, her ſecond Huſband be-"comes entitled to the Moiety of the ſurplus of the Grandfather's property in her right "(now ſettled), which he may diſpoſe of as he pleaſes, and ſhe may be ſtript both of "Jointure and Portion."

"The Law has entruſted the Father (or Guardian) with the Marriage of his Children; "but they ought not to uſe it to their diſparagement. Suppoſe he does it fraudulently

"and

and of her Portion, makes a Jointure on his Wife; though ſhe was an Infant, ſhe cannot waive her Jointure and ſet up her Dower. So it is expreſsly laid down, 1 Inſt. 37. Now in Equity, where there is a Settlement, in conſideration of Marriage, and of the Wife's Portion, conſiſting of Securities, if the Huſband dies before they are got in, his Executor ſhall have them, and not the Wife. The Huſband would become a purchaſer of the Wife's Portion; and his Repreſentatives might

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" and corruptly, is the Agreement therefore to be ſet aſide or broken in upon, or the " Children not to have the benefit of what is ſtipulated? By no means; but the Guardian " may be compelled to make ſatisfaction, or the Huſband, if he is party to the Fraud."

" In the caſe of a Father; if a Child has a Fortune independent, and the Father diſ- " poſes of the Child in Marriage corruptly, and takes an advantage to himſelf, this " Court would relieve againſt the Father. On this ground depend the Caſes of Relief " againſt private clandeſtine Agreements, made in fraud of the public open Agree- " ment."

" But this Caſe comes within none of theſe reaſons of diſagreement—Couſin-german " —Heir Male of her Mother's Family—a natural match to deſire—no pretence of any " Corruption, Fraud, or ill Practices in the Father or Mother—no lucrative advantage " taken to themſelves. On the contrary, every thing done on their parts to advance " the Child. The Mother conſents to the Marriage—accelerates her right to the " £. 5,000, and veſts it immediately—confirms a method to charge the Father's Eſtate " with £. 3,000, of which, in the event, ſhe might not have been entitled to one ſhilling " —this they leave, for the benefit of her and her Children, to diſencumber the ſettled " Eſtate, and for the proviſion for the Children."

" The ſecond Objection is, That they have not made ſo beneficial a bargain for this " Daughter as they might have done. If it were ſo, is that a ſufficient reaſon for " ſetting aſide a Marriage Agreement? The Law has entruſted the Parents with the " care of the Marriage of their Children; there are many conſiderations, which may " induce them, beſides ſtrict Equality, or advantage in Settlements—inclination of the " Parties—rank and quality of the Perſon—convenience and propriety in Families— " bringing together and uniting different parts of the ſame Eſtate; all theſe are proper " reaſons. The Statute of Jointures is a ſtrong evidence of the Judgment of the Legiſ- " lature upon this point. Jointure on an Infant before Marriage, though not equal " to Dower, is a good Bar. It is true that the greateſt part of the proviſion for this " Lady aroſe from her Grandfather; but was it ever thought that a Father could not " effectually contract for the Marriage of his Daughter, and the diſpoſing and ſettling " of her Portion, though that Portion roſe from a collateral Relation?"

" Moſt

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might compel her to aſſign thoſe Securities to them, though ſhe was, at time of the Marriage, an Infant."

"There may, indeed, be ſome diſtinction; for if there was any Colluſion in making a Jointure, merely to bar her Dower, and not to make a Proviſion for her, ſuitable to her Fortune and Quality, theſe circumſtances might alter the determination of a Court of Equity. The preſent Caſe, indeed, is that of an "Agreement" only for a Jointure; but that will make no difference in Equity, as things contracted to be done, are conſidered as done, and Marriage Articles are uſually, in

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"Moſt Portions ariſe from Settlements, of which the Children are Purchaſers, and not "in the power of the Father. No inſtance of a private Act of Parliament applied for "to ſettle ſuch a money Portion."

"Third Objection. Suppoſe this might be done as to veſted Portions, becauſe they "are in the power of the Huſband; yet not as to contingent Intereſts, becauſe theſe are "not in the power of the Huſband."

"I will not enter now into the Queſtion about the Huſband's power to diſpoſe of the "poſſibilities of the Wife.——Theobald and Duffay goes a great way; but it would be "very extraordinary and miſchievous to ſay, the Father could not do it. Many Portions, "ariſing under Marriage Settlements of Fathers, are contingent; ſometimes depend "upon Survivorſhip, and the Contracts concerning them are to prevent that abſolute "power the Huſband would have over them, when they became veſted; the Objection "relied upon, takes its riſe from the event having fallen out one way, that is, the "Huſband dying before the Contingencey."

"But ſuppoſe Mr. Aſhley had died during the Life of Mr. Pitfield, and no care "taken or Proviſion had been made about this ſhare of the ſurplus. All Agreements of "this kind are made to prevent the power and right of the Huſband ariſing from the "Marriage; and it would be moſt dangerous for a Court of Juſtice to enter into the "Queſtion, whether they are more or leſs beneficial for the Infant. As I ſaid at firſt, "I know no precedent where a Marriage Settlement of this kind has been called in "Queſtion in this Court; but Caſes have been, where Agreements have been entered "into by Infants, with the conſent of their Guardians, or by Guardians on their behalf, "which this Court would not ſuffer to be broke in upon."

"As to ſo much of the Bill as ſeeks to ſet aſide or otherwiſe break in upon the Set-"tlement dated 29th June 1737, made on the Marriage of DOROTHY with CHARLES "PITFIELD, her former Huſband, let it be

"DISMISSED."

in Courts of Equity, ſtrongly ſupported: the Court will certainly compel the Heir to perform them; and the Wife is conſidered as fully by them as by an actual Jointure. This is agreeable to the reaſon of the Caſe of *Blow* v. *Lady Hereford*, 2 Vernon, 501." Earl of Buckinghamſhire againſt Drury.

In the Caſe of *Harvey* v. *Aſhley*, Sir Dudley Ryder was Counſel for the Infant; and the Caſe of *Price* v. *Seys* being cited, he ſays, "As to Price *v.* Seys, the Dower being barred is no more than the effect of the Statute of Jointures, which makes all Jointures of Infants, as well as of Women of full age, a Bar." It is there taken for granted, by one of the greateſt Lawyers that ever was in Weſtminſter Hall, that it was a ſettled point; and laudable as his zeal was for all his Clients, yet the conviction of his own mind was ſo ſtrong, that he did not make the leaſt effort to controul it.

The Opinion, which was given upon great deliberation, has been ſo fully ſtated already, I will not repeat it: and I take upon myſelf to ſay, that no man at the Bar entertained the leaſt doubt of the legality of that Opinion.

As to the Caſe of *Cray* v. *Willis*, I cannot find any Note of it taken by any body *(a)*.

Sir

(a) This Caſe is very ſhortly ſtated in 9 Vin. Abr. Tit. *Dower*, 2. 3. c. 18. By the Regiſters Book it appears to have been as follows:

Jeremiah and *Elizabeth Cray*, Infants - - - - - - - PLAINTIFFS.

AGAINST

James Willis, *Mary Cray*, Widow, and others - - - - - DEFENDANTS.

The Plaintiffs, as the Infant Children of *Jeremiah Cray*, deceaſed, filed their Bill in the Court of Chancery, againſt *James Willis*, *Mary Cray*, the Widow and Adminiſtratrix of the ſaid *Jeremiah*, and others; ſtating, "inter alia," that the ſaid *Jeremiah Cray* died in

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Sir Dudley Ryder was then Solicitor General, and moſt probably in the Cauſe, or at leaſt muſt have heard it; and though very minute in

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in 1731, inteſtate, poſſeſſed of real and perſonal Eſtate, leaving the Plaintiff *Jeremiah* his Heir at Law, and the Plaintiff *Elizabeth*, his only Daughter (both Infants) the Defendant *Mary Cray*, his Widow, and Mother-in-Law to the Plaintiffs, four Brothers (one of whom was dead) and three Siſters, all Infants, and that the Defendant *James Willis* had been employed by the Inteſtate as his Steward; and praying that the Defendants *Mary Cray* and *James Willis*, might account for the Perſonal Eſtate and Rents come to their hands. The Defendant *Mary Cray*, by her Anſwer, admitted the relationſhip, and that the Inteſtate left her with child, which was afterward born a Daughter, named *Mary Carne Cray*, and ſtated that the Inteſtate, before her Marriage (ſhe being then under age) by Indenture charged ſeveral of his real Eſtates with an Annuity of £. 200 to her for Life, and after her Death, upon truſt, to raiſe a like Sum yearly, and pay it amongſt the Children of the Marriage; but that in the ſaid Indenture, the ſame was not agreed to be in Bar of Dower: and therefore ſhe hoped ſhe ſhould not be concluded thereby, but have her option, either to abide by the ſaid Settlement, or take her Dower, whichever ſhould appear moſt for her advantage. The Defendant *James Willis* admitted his employment, and ſet out an account. The Defendants, the Infants, alledged, that the Inteſtate, as Adminiſtrator "de bonis non" of their late Father, poſſeſſed his perſonal Eſtate to the amount of £. 20,000. The Defendant *Samuel Cray* alledged, that *Elizabeth Cray*, his late Mother, gave the reſidue of her perſonal Eſtate (of the value of £. 7,000) to him and *Hannah*, his Siſter, ſince deceaſed, and made them Executors; but that they being Infants, Adminiſtration was granted to the Inteſtate during their Minority. AND the Cauſe coming on to be heard at the Rolls, on the 14th May 1734, his HONOUR DECREED and ORDERED, that the Plaintiffs do bring an Adminiſtration to *John, Mary, Elizabeth*, and *Hannah Cray*, before the Maſter (Holford) who was to ſee what Claims the Defendants had on the Inteſtate's Eſtate; and that the Defendants, the Widow and *James Willis*, ſhould come to an Account for the Perſonal Eſtate come to their hands, and that the clear reſidue ſhould be divided into three parts, one to be retained by the Widow, and the remaining two-thirds to be ſubdivided into thirds, whereof the Plaintiffs ſhould each have one, and the remaining third to be ſubdivided into thirds amongſt the Plaintiffs and the Widow. And that the Receiver ſhould be continued, and paſs his Accounts annually before the Maſter, who was to ſee what was the annual value of the Eſtate; and when the ſame ſhould be ſeen, the Defendant *Mary Cray*, was to make her Election, before the Maſter, whether to abide by her Jointure of £. 200 a year, or waive it and take her Dower; and if ſhe ſhould elect to take her Dower, the Maſter was to aſſign her her Dower, out of the Inteſtate's real Eſtates, and ſee what was due to her on account thereof, which was to be paid by the Receiver out of the Rents.

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in his Notes, upon every thing which paſſed in Court, yet there is not the leaſt notice taken of it in his Note Books. And if this point had been debated, or it had been conſidered as any authority, it is almoſt impoſſible to conceive that the two Caſes, of Price and Seys, and Harvey and Aſhley, ſhould not have produced it.

It muſt have been a Caſe which paſſed "ſub ſilentio;" and though the Anſwer mentions the Wife being under age when the Jointure was made, yet the reaſon inſiſted upon by the Anſwer, as ſtated in the Decree, was, "that it was not agreed to be in Bar of Dower; "and ſhe therefore hopes ſhe ſhall not be concluded thereby, but "have her option, either to abide by the ſaid Settlement, or take her "Dower, which ſhe thinks moſt to her advantage." And neither the Anſwer nor the Decree puts her Right of Election upon her Infancy. It ſeems to have proceeded upon an apprehenſion, that a Jointure, within the Statute, muſt be mentioned in the Deed to be in Bar of Dower. But if ſuch a Conſtruction had been given upon the matureſt deliberation, it is not to be oppoſed againſt the Opinion that has been cited.

As therefore the words and reaſon of the Law, the manifeſt and clear intention of the Legiſlature, (evidenced by the Proviſo) the ſubject matter of the Right, ſpringing out of a Contract they were capable of making, all conſpire to make the Bar operate upon Infants as well as adult Perſons; As it would check the moſt advantageous Marriages they could make, if they were to have the Election contended for; (for a Jointure, fairly made, is a much more beneficial Intereſt than Dower; and if it is fraudulently made, there is ſtrength enough in the Common Law to controul it; and by a Conveyance to Truſ-

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tees before Marriage, or by a ſtrict Settlement with Power of Revocation, the Right of Dower may always be defeated:) As the conſtruction I put upon this Act can never operate to the prejudice of Infants, but, by enabling them to marry into the greateſt Families and Fortunes in the Kingdom, muſt frequently operate to their advantage; As this conſtruction has been ſanctified by the Practice of two Centuries, and the Opinion of the greateſt Magiſtrates, I will conclude with a Queſtion aſked by Camillus in Livy:

"Quæ ratio eſt expertis alia experiri?"

Mr. Baron GOULD, Lord Chief Baron PARKER, and Lord Chief Juſtice PRATT, delivered their Opinions in the Negative; Mr. Juſtice BATHURST, Mr. Baron ADAMS, and Mr. Baron SMYTHE, with Mr. Juſtice WILMOT, in the Affirmative *(a)*.

WHEREUPON,

(a) It appears from a MS. Note of Mr. Juſtice WILMOT, that Lord HARDWICKE and Lord MANSFIELD were of Opinion with the majority of the Judges; and that Lord Mansfield ſaid, "The general Queſtion is, if Lady DRURY, having the Proviſion ſtipulated for her by her Marriage Articles, is not barred of her Dower. That Infants are not bound by their Agreements, was never held univerſally any where in the world: by our Law, ſome bind abſolutely, ſome are void, ſome are voidable. If the tranſaction were fair, a bargain and ſale of lands by an Infant for neceſſaries would be good: if an Infant pays money with his own hand, without a valuable Conſideration, he cannot get it back again; if he receives Rents, he cannot demand them again when of age. What then is the Agreement in this Caſe, and what are the circumſtances of it? It is an Agreement in order to the Infant's advancement; Mariage is ſo. What ſort of a Marriage? With the Conſent of her Father and Guardian. Lady DRURY was then near twenty-one: there is no objection as to the fairneſs of the tranſaction. She had only £. 2,000 for her fortune; it was an advantageous bargain for her at the time . . . . . Better terms may be obtained for Infants, by Parents and Guardians, than when they are of full age:

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WHEREUPON, and upon due conſideration and debate of what had been offered on either ſide in this Cauſe,

It was ORDERED, That ſo much of the ſaid Decree complained of by the ſaid Appeal, whereby an account is directed to be taken of the Perſonal Eſtate of the Inteſtate Sir THOMAS DRURY, &c. be AFFIRMED, and that the Reſidue of the ſaid Decree be REVERSED: and it is hereby declared, that the Reſpondent is bound by the Agreement entered into in conſideration of and previous to her Marriage with the ſaid Sir THOMAS DRURY, and that the ſame ought to be performed and carried into Execution, and that the Reſpondent is thereby barred of her Dower, and of any Share of the ſaid Sir THOMAS DRURY's Perſonal Eſtate, under the Statute for the Diſtribution of Inteſtate's Eſtates.

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by much the greateſt number of women are married Infants; but they are not to be an inſtrument to defraud others—no difference if premeditated Fraud, or it turns into a Fraud. If the Statute of Hen. VIII. had never been made, Courts of Equity would have given Relief; but I am moſt clearly of Opinion, that Infants are barred under that Statute: That Act was made for Uſes, not for Jointures; this is a Proviſion ariſing out of the general conſequences of Uſes .... Then conſider the uſage and tranſactions of mankind upon it: the object of all Laws with regard to real Property is quiet and repoſe. As to practice, the greateſt Conveyancers, the whole profeſſion of the Law; Sir Orlando Bridgeman—Lord Nottingham—there was not a doubt at the Bar in Harvey and Aſhley. Mr. Fazakerly always took it for granted, that Infants were bound. The Uſage began on a legal Determination within thirty years after the Statute. Marriage Settlements would be totally ſubverted without the interpoſition of the Legiſlature; and I concur with Lord Hardwicke in Opinion, that no man living could draw ſuch an Act of Parliament. I never will put ſuch an expoſition on the Law, as to make it neceſſary to apply to Parliament to rectify it."

IN THE KING'S BENCH.

BADDELEY against LEPPINGWELL.

Trin. 4 Geo. III. 1764. v. 3 Burr 1533. Baddeley againſt Leppingwell.

THIS was an Action of Treſpaſs, for breaking and entering the Plaintiff's Cloſe. The Defendant pleaded, 1ſt. The general Iſſue, "not guilty;" and 2dly. a Juſtification under a Grant in Fee from the Lord of the Manor of Hedingham Borough, in the County of Eſſex, on the 10th December 1761. Plaintiff replied, that before the ſaid Grant, viz. on 3d July 1754, the Lord granted the ſaid Cloſe to the Plaintiff and her Siſter Ellen, and their Heirs in Coparcenary: that Ellen died, and afterwards, on the 24th June 1756, the Lord granted her Moiety to the Plaintiff in Fee. The Defendant rejoined, and inſiſted on his Title, under the Grant to him of the 10th December 1761; upon which Iſſue was joined.

The Cauſe was tried at the Lent Aſſizes for Eſſex, in 1764, before Mr. Juſtice BATHURST.

The Treſpaſs was proved upon the Iſſue taken on the Plea of "not guilty;" and upon the ſecond Iſſue, a ſpecial Caſe was reſerved, to the following effect:

THOMAS IVES, being ſeiſed of this Copyhold Eſtate, and having ſurrendered the ſame, by his Will deviſed it to SARAH BOREHAM: The words in his Will, upon which the Caſe turned, were as follows: "I give to CLEMENT BOREHAM, the Houſe I now live in, for his

"natural

" natural Life, he paying thereout 40*s.* a year to ROBERT BOREHAM.—I give and bequeath my two Copyhold Tenements, &c. " (being the Premiſes in queſtion) to SARAH BOREHAM, ſhe paying " thereout 40*s.* a year to her Siſter ELIZABETH BOREHAM."—

SARAH BOREHAM, by her Will, dated 4th June 1744, deviſed the Premiſes to ELIZABETH, her Siſter, in Fee. ELIZABETH married one BADDELEY, and had Iſſue by him the Plaintiff, and her Siſter ELLEN. ELLEN died an Infant, and upon her Death, her Moiety came to the Plaintiff.

On the part of the Defendant, it was contended, that THOMAS IVES did not deviſe the Eſtate to SARAH BOREHAM, in Fee; but only for her Life; and that the Reverſion deſcended upon his Heir at Law. That he had a Brother named JOHN; that JOHN left a Son THOMAS, who ſurrendered to the Defendant LEPPINGWELL, and that the Deviſe to SARAH BOREHAM, being for Life only, Defendant was intitled to the Eſtate under THOMAS, the Heir at Law.

The Plaintiff, in anſwer to this Defence, inſiſted, firſt, that SARAH BOREHAM took the Fee under the Will of THOMAS IVES; and ſecondly, that if ſhe did not, yet, as the Iſſue was joined upon the Fact of the Grant made to her and her Siſter ELLEN, the operation and validity of the Grant could not be controverted upon this Iſſue.

The Queſtions ſubmitted to the Court were,

1ſt.—Whether SARAH BOREHAM took an Eſtate in Fee, or for Life only, under the Will of THOMAS IVES?

2d.—If ſhe took an Eſtate for Life only, whether Defendant could take advantage thereof on the Iſſue joined?

Mr.

Baddeley againſt Leppingwell.

Mr. Leigh for the Plaintiff contended (on the 1ſt. Queſtion) that where a Teſtator lays ſuch a Charge upon the Eſtate deviſed, as may render it a burthen to the Deviſee in any year, the Deviſee ſhall take in Fee; and that in the preſent Caſe, Sarah the Deviſee may be a loſer by the Deviſe, unleſs ſhe takes a Fee; for the Annuity is not reſtrained to Sarah's own Life, but is a continuing Annuity: and he cited the Caſe of Reed *v.* Hatton. 2 Mod. 25.

And on the 2d Queſtion. As this is merely a poſſeſſory Action, it is not neceſſary for the Plaintiff to ſet out a Title, unleſs the Defendant had ſet out one himſelf, which he has not done. The prior Grant to Thomas Ives, ſet forth in the Rejoinder, ought to have been "ſpecially" pleaded: but Defendant has only traverſed the Grant to the Plaintiff, by which only the legal operation of the Grant, not the Plaintiff's Title, is put in Iſſue. He cannot, upon this Traverſe, go into the Title of Thomas Ives, or give Evidence of any thing foreign to the Point in Iſſue. The Plaintiff could not tell how to direct her Evidence; for Defendant might as well claim under any other perſon as Thomas Ives. The Iſſue being taken on the Grant, it is enough for us to prove the Admiſſion, which we did prove. If the Defendant could have invalidated it, that ought to have been by pleading "ſpecially."

Mr. Ashurst, for the Defendant, admitted that where a Deviſee is charged with the Payment of a Sum in groſs, he ſhall have a Fee, though the Eſtate be not deviſed to him "and his Heirs;" but an annual Payment, "out of" the thing deviſed, will not create a Fee; becauſe the Deviſee cannot loſe by the Deviſe. Here the value of the Eſtate deviſed is £. 5. 6*s.* per annum, and the Charge is only 40*s.*

40*s.* per annum; therefore, the Deviſee was ſure not to be a loſer.

And as to the 2d Queſtion, That upon this Traverſe nothing but the effect of the Grant can be controverted. The Pleading in Caſes of Freehold is different from that in Caſes of Copyholds. A Copyholder, in the Eye of the Law, has only an Eſtate at Will, and he may alledge an Admittance as a Grant. The Lord can only transfer an Eſtate according to the Surrender: if he exceed this Authority, his Admittance is good only "pro tanto." Now, if SARAH BOREHAM was, as we contend, only Tenant for Life, ſhe had no Eſtate which ſhe could deviſe at her death; conſequently the Admiſſion of the Plaintiff and her Siſter ELLEN is, in effect, a Grant of "nothing." The Defendant therefore in his Rejoinder denies that the Lord granted the Eſtate, and ſhews a Title in himſelf: and as the Plaintiff, being a Copyholder, could not plead a Title, but could only plead it as a Grant from the Lord, the Defendant could only traverſe the Grant, which he has done; and having traverſed the Plaintiff's Title, he properly ſets up his own.

Mr. LEIGH in reply inſiſted that the Charge of the Annuity might have continued longer than the Deviſee's life, and therefore the Deviſe might have been prejudicial; and relied on the Caſe of *Anſley* v. *Chapman*, in Cro. Cha. 157. and *Reed* v. *Hatton*, before cited, and on *Lee* v. *Stephens*, et al. 2 Shower, 49. where a Deviſe to James, conditionally, that he ſhould "allow to Nicholas, meat, drink, &c. during his life," was adjudged a Fee. He likewiſe cited *Humberton* v. *Howgill*, in Hobart, 72. The preſent Deviſe, he ſaid, was intended as a Proviſion for both Siſters, and it was not meant that the Annuity ſhould ceaſe upon the death of SARAH; and it was payable

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out of the Eſtate, not out of the Rents: and as to the ſecond point, that the Defendant could not put the Plaintiff to ſhew any other Title, than the Grant of the Lord: the difference of Pleading is only in point of Form.

Lord Mansfield and Mr. Juſtice Denniſon being both abſent, Mr. Juſtice WILMOT on this day *(a)* declared the Opinion of the Court:

(a) 9th July 1764.

There are two points referred to the Court;

1ſt.—Whether SARAH BOREHAM took an Eſtate in Fee, or for Life, under the Will of THOMAS IVES?

2d.—If only for Life, whether the Defendant could take any advantage of the Plaintiff's want of Title upon the Iſſue joined on theſe Pleadings?

The firſt Queſtion is the material one; for if ſhe took a Fee, the Lord's Grant to the Plaintiff and ELLEN her Siſter, and their Admittance, would operate as a Grant of the Fee; and we think SARAH BOREHAM took a Fee under the Will of THOMAS IVES.

The Caſe upon the Will is ſimply this: THOMAS IVES, ſeiſed of a Houſe in which he lived, and of two Copyhold Tenements, which he had ſurrendered to the uſe of his Will, and having a Daughter, ELIZABETH BOREHAM, and many Grand-Children, of which SARAH the Deviſee was one, made his Will, dated the 3d December 1740, by which he deviſes the Houſe to CLEMENT BOREHAM for his Life, "he paying thereout 40*s.* per annum to ROBERT BOREHAM, the "Teſtator's Grandſon," and after CLEMEMT BOREHAM's Deceaſe, to be equally divided between ROBERT, SABIL, and JEREMIAH BOREHAM, the Children of ROBERT BOREHAM, deceaſed (who were his Grandſons); and he gave his two Copyhold Tenements to SARAH BOREHAM, "ſhe paying thereout 40*s.* per annum to her Siſter ELI-

ZABETH

ZABETH BOREHAM:" then he gave £.40. between his two Granddaughters, ANNE and MARY BOREHAM, and made ſeveral other Bequeſts.

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The Principle upon which all Caſes, ariſing on the Conſtruction of Wills, muſt depend, is admitted by the Counſel on both ſides, viz. That the Intention of the Teſtator is to be collected from the whole Will conſidered together, and ſuch a Conſtruction to be made as will effectuate that Intention. But that collection and inference muſt be drawn from the Will itſelf, "ex viſceribus Teſtamenti;" and all wanton, arbitrary, whimſical conjectures of Intention, are to be baniſhed from the mind, when it is to judge upon ſuch a Queſtion; for though the Intention need not be evidenced by a "neceſſary implication," as in the Caſe mentioned out of Vaughan; yet it muſt be a clear, apparent Intention, evidenced by the words of the Will, in ſuch a manner as to leave the mind quite ſatisfied of that Volition of the Teſtator; and therefore let him uſe what words or expreſſions he will, if they diſcloſe what he means, it is the Law to his Family, and muſt be obeyed; and the indulgence which the Law ſhews to this kind of Inſtrument, is owing partly to the words of the Act of Parliament, which enables perſons to deviſe at their will and pleaſure, and partly in reſpect of the ſituation which men are in when they make their Wills, incapable of getting advice; and therefore the Law delivers them from the Vaſſalage of Form and technical words, and only expects that their meaning ſhould be told in writing.

As this is the Principle, and the only difficulty lies in the Application of it, other Caſes, unleſs they were the ſame in all circumſtances, rather obſcure than illuminate theſe kinds of Queſtions. When the mind is in purſuit of the Teſtator's Intention, diſſimilar Caſes are

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"Ignes fatui," that miſlead the mind, inſtead of directing it; and therefore the Counſel very properly avoided loading their Arguments with multitudes of Caſes, and only mentioned two or three, which came the neareſt to the Caſe in queſtion, and which I will take notice of preſently; and the Counſel have put the Queſtion upon its proper point, viz. Whether an apparent Intention to give the Fee, can be collected from the "words" of this Will?

I collect that Intention from the different penning of the Deviſe to CLEMENT BOREHAM, with the limitation over upon it, and of the Deviſe to SARAH BOREHAM.

When the Teſtator meant to give an Eſtate for Life, he has ſaid ſo; and has expreſſed that Intention very particularly by words apt and proper for that purpoſe, "for and during the term of his natural Life, paying thereout 40*s.* a year to his Grandſon ROBERT;" and finding, from that partial Diſpoſition, that he had ſomething left in him ſtill to give, he deviſes that Houſe, after the death of CLEMENT BOREHAM, to be equally divided between ROBERT and JEREMIAH BOREHAM; but in the Deviſe to SARAH, he omits the words "for and during the term of her Life," which he would certainly have inſerted if he had intended it.

This difference of expreſſion paints the Diſtinction which his mind had taken between giving part of his Eſtate in the thing deviſed, and his whole Intereſt in it: the Deviſe to SARAH follows the Deviſe to CLEMENT immediately: if he wrote, he could not but ſee them; if read to him, he muſt have heard the ſound of the words; all reſted with him. For though a Deviſe to A. generally, unaſſiſted by other Clauſes which mark the Intention, would give only an Eſtate for Life, yet it is plain the Teſtator did not think ſo; for if he had, it was

quite

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quite unneceſſary and nugatory to have inſerted the reſtrictive words "for Life." This is therefore one deciſive mark drawn from the Will itſelf, to ſhew that when the Teſtator meant to give an Eſtate for Life, he ſaid ſo; and conſequently, that when he gave the thing generally, he did not mean an Eſtate for Life only; and indeed I believe all men, unacquainted with the Law, when they mean a Reſtriction, they expreſs it; and when they give the thing generally, they mean the abſolute property of the Land, as much as of a perſonal Chattel; and the Cuſtom of deviſing which prevailed antecedent to the 32 Hen. VIII. and was a Relic of the Saxon Law, was to deviſe Lands, "ut Bona et Catalla."

Another circumſtance of Intention is, limiting the Eſtate over upon the firſt Deviſe, where it is expreſsly given for Life, and making no Limitation over upon the ſecond; indeed he might intend to limit a Remainder over on one Eſtate and not on the other, and therefore this alone would not be ſufficient to warrant the inference of a different Intention; but ſtill it ſtrengthens the other Evidence, and acts as an auxiliary proof of the Intention.

But the moſt material paſſage in the Will, from whence I collect the Intention, is the Condition of paying the Annuity to Elizabeth Boreham.

Mr. Ashurst very forcibly urged, that the word "thereout," is a very emphatical word, and brings the Caſe directly within the diſtinction in Collier's Caſe, 6 Co. that where the Condition is to pay generally, there the Fee will paſs, by reaſon of the poſſibility of Loſs; but where the ſum is to be paid out of the Rent sand Profits, then as there is no poſſibility of a Loſs, becauſe he is not to pay till he has received, there it will not enlarge the legal operation of the de-

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viſing words and give a Fee; and that the word "thereout" is equivalent to ſaying, out of the Rents and Profits; and I think it is, and if it had been a ſum in Groſs, it would have been a very different Queſtion.

How far the different penning of the two Clauſes which I have already mentioned, might have influenced the Queſtion, independent of the Condition, is a matter of ſpeculation, not worth debating; for here it is not a ſum of money in Groſs, but an Annuity to the Deviſee's Siſters, who were both Grand Daughters of the Teſtator: They both ſtood in an equal degree of Relation to him, and it is manifeſt he was providing for them both: It is impoſſible to conceive he meant to make the Proviſion for one Grand Daughter to depend upon the Life of another, and to diſinherit his own Grand Child in favour of his Brother: and eſpecially when by a ſubſequent Clauſe in his Will, he gives £. 20 a piece to two other of his Grand Daughters, ANN and MARY BOREHAM; That Bequeſt gives them the abſolute property in that money, and that Legacy is equal in value to the Annuity at the rate of 10 years Purchaſe; and as he ſeems to have aimed at an Equality, the pecuniary Legatees would be ſure of £. 20, whereas ELIZABETH might have nothing if Sarah died within the year: And it would be directly contradicting the legal operation of the words in the Will, and the very conſtruction which words of the ſame import ought to have as to SARAH BOREHAM. For the Defendant admits and inſiſts that the deviſe to SARAH BOREHAM gives her an Eſtate for Life: if ſo, why will not the Deviſe of the Annuity to ELIZABETH BOREHAM give her a Life eſtate in the Annuity? and if it does, SARAH muſt take the Fee. For the Security muſt be intended to anſwer the thing ſecured: The Annuity cannot come out of the thing deviſed as long as the Annuitant

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tant lives, unleſs the Deviſee takes the Inheritance, and it really almoſt amounts to a neceſſary implication: For if an Eſtate is given to a particular perſon, and an act directed to be done with that Eſtate, or any payment to be made out of it, which cannot be done but by veſting the Inheritance in the firſt Deviſee, it muſt neceſſarily give the Inheritance, and is divided by very thin partitions from a neceſſary implication; it is certainly a violent preſumption, which Lord Coke ſays, 1 Inſt. 6. is "plena probatio;" and a full proof of Intention, out of the Will itſelf, is the proof which the mind is to purſue and to endeavour to attain; and it is ſomething like the Caſe of Shaw and Weigh, 10 Geo. I. 1 Eq. Ca. Ab. 184. where an Eſtate was deviſed to Truſtees generally, without any words of Inheritance; but it was upon Truſts and to ſupport Eſtates which required an Eſtate of Inheritance in the Truſtees, and therefore it was held to give it; and the Caſe cited by Mr. Leigh of Reed and Hatton, 2 Mod. 25. comes near this Caſe, but it is not exactly the ſame; ſo far it reſembles it, that the Houſe is given upon Condition that he pay unto his Siſters £. 5 a year: The word "paying" in this Caſe makes a Condition, and is exactly the ſame as the words in that Caſe, "upon condition that he pay:" But in that Caſe the payment is not directed to be made out of the Eſtate, but quarterly; and the firſt payment might be in one month after the Teſtator's Deceaſe, and before Robert could have received any Profit; and therefore the poſſibility of a Loſs was an ingredient in that Caſe; but ſtill the Caſe applies to prove that they took the annuity for their Lives under the words "upon Condition that he "pay to his Siſters £. 5 a year." For what the Court ſays does not prove, as Mr. Ashurst contends, that they were given for Lives expreſsly, but muſt be taken as their ſenſe of the operation of the words marked in

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Italics, and could be printed in that Letter for no other purpoſe but to inform the Reader that thoſe were the very words of the Will; and the Court relies upon thoſe words, as plainly proving that the Teſtator intended the Deviſee a Fee ſimple.

The Caſe in Cro. Cha. 157. Anſley v. Chapman, was cited by Mr. Ashurst to meet this Objection. There was a Deviſe of Lands by ſeveral Clauſes to ſeveral Sons, and particularly to Michael and Henry; then the Teſtator declares that they ſhall bear a proportionable part of £. 40 a year to his Wife for Life; and yet the Court held that Payment did not enlarge their Eſtates into a Fee: But Mr. Leigh gave the true Anſwer: The Charge was not made for the Wife by the Will; for it recites a prior Obligation to pay it, and therefore the Payment did not at all depend upon the duration of the Eſtates which the Sons took under the Will. Mr. Ashurst did endeavour to take off the force of the Argument ariſing from the Deviſe of this Annuity, by obſerving that the Annuity, in the firſt Deviſe, determined with the Life of the Deviſee who was directed to pay it, and if he meant it in that Deviſe, he might alſo mean it in the other: But the Annuitant is one of the Perſons to whom the Eſtate is limited in Remainder, for as there is no other of that name mentioned in the Will, they muſt be intended to be the ſame: But if not the ſame, there is a very eſſential Difference between the Caſes: The Eſtate is expreſsly given for Life to the Deviſee in the firſt Clauſe; whereas in the ſecond, it is given generally; the words in the firſt Clauſe muſt controul any preſumption of Intention in the one Caſe; but becauſe he hath framed his Deviſe in ſuch a manner in one Caſe that the Annuity muſt drop with it, there is no foundation to infer, that where he has framed the Deviſe in a different manner in another Caſe, that he intended the Annuity ſhould drop

drop with it. The Reverſe is rather to be preſumed, and that if he had had the ſame intention in both, he would have expreſſed himſelf in the ſame manner.

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As we think Sarah Boreham took a Fee ſimple under the will of Thomas Ives, and conſequently, that the Plaintiff and Ellen had the Fee when they were admitted by the Lord, the Queſtion upon the pleadings becomes quite immaterial; but if the fact was, as the Caſe ſtates it, that Thomas Ives, as the Nephew and Heir of the Teſtator, was entitled to this Copyhold Eſtate, in caſe Sarah took only an Eſtate for Life; and conſequently, that the Defendant Leppingwell under him, and as his Surrenderee, had the legal Title to this Eſtate, I ſhould have thought that upon this Iſſue, the Grant of the Lord to the Plaintiff and Ellen, would have been a mere nullity, and that the Plaintiff's proving the fact of the Grant, without any right at all, would not have proved the Iſſue againſt the Defendant's having the real right to the Eſtate.

Originally Copyholders were mere Tenants at will, a claſs of middle men between Freeholders and Villeins; free as to their Perſons, but not as to their Eſtates; inferior to Freeholders, who were free both as to their Perſons and Eſtates; ſuperior to Villeins, who were free neither as to their Perſons nor Eſtates; and in very ancient times, the word Freehold, was meant to deſcribe an Eſtate which could not be taken away by the Lord, in oppoſition to every other ſpecies of Eſtate, which always lay at the mercy of the Lord: By degrees, this ſpecies of Eſtate acquired a ſtability; Cuſtom, which is immemorial Uſage, clothed it with one material quality, analogous to a Freehold Eſtate, viz. that the Lord ſhould not "ad libitum" reſume it; that the Heir, where it was a Copyhold of Inheritance, ſhould be entitled to the Eſtate, paying a Fine, certain or uncertain,

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"according to the Cuſtom of the Manor," upon his Admittance; and the Fine not being due till Admittance, it became the Lord's intereſt to admit him; but ſtill the Admittance gives no right, and even in the Caſe of a Surrender, the Eſtate acquired by the Surrender depends entirely upon the Right which the Surrenderor had at the time of the Admittance: The Lord, in both Caſes, is a mere Inſtrument, and the only difference between an Admittance on a Deſcent and a Surrender is, that it is neceſſary, in the one Caſe, to entitle the Lord to his Fine, and it is neceſſary, in the other, both to take the Eſtate out of the Surrenderor, and alſo to entitle the Lord to his Fine; but, in either Caſe, no Eſtate really paſſes from the Lord; and even after the Surrender, and before the Admittance, the Eſtate remains in the Surrenderor, and is not veſted at all in the Lord, not even in "tranſitu," between the Surrender and Admittance; and though every Admittance may be pleaded as a Grant, yet it really operates as a Grant only in reſpect of the Lord, and againſt his Right as Lord; for to every other perſon and purpoſe whatſoever, it is valid or void according to the Right of the Parties. The Surrender controuls the Admittance in all Caſes whatever; if the Surrender is for Life, and the Admittance in Fee, the Eſtate of the Copyholder is according to the Surrender, and not according to the Admittance: So if the Lord admits A. and B, where the Surrender is only to A, the whole Eſtate is in A; or if the Surrender is abſolute, and the Lord admits upon Condition, the Condition is void; the reaſon given is, becauſe the Lord has only a cuſtomary power to admit, according to the Surrender, and ſo far as he exceeds that power, the Act is void. 4 Co. 28. b. In the Caſe of a Deſcent, the Admittance is of ſtill leſs validity, for it is not ſo much as neceſſary to complete the Title;

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and if the Lord admits twenty different perſons as Heirs at Law, the unadmitted real Heir at Law will have a good Title againſt them all; and the Grant in the preſent Caſe is ſtated expreſsly to have been made to the Plaintiff and her ſiſter Ellen, in "Coparcenary," which ſhews the nature of this Grant; and therefore if they had no Title as Heirs at Law, the Grant and Admittance were totally void, and the Defendant could traverſe nothing elſe but the Grant; for the Allegation, "by virtue whereof they were ſeiſed," is not a matter traverſable; but the Traverſe is taken properly to the Grant, which puts the Right of the Copyholder properly in Iſſue; and the Grant is good or void, and the Plea proved or diſproved, as that Right is determined.

As to the Caſe of Humberton and Howgill, in Hob. 72, where it is ſaid, "if Iſſue be taken directly, enfeoffed or not enfeoffed, it muſt be avoided by Covin ſpecially pleaded, for it is a Feoffment tiel quel." 1ſt. This was not the point of the Caſe: but, 2dly. The Feoffment was good to every intent and purpoſe, except as againſt Creditors; whereas, in the preſent Caſe, it is void againſt every body; for even the Lord himſelf may admit the real owner, and the firſt Admittance will not defeat or fruſtrate the ſecond. And in that Caſe, if Feoffment by a perſon incapable from the nature of the eſtate, or other incapacity, which renders the act totally void,—it would prove the Plea. It is then ſaid, that a poſſeſſory Action is not ſufficient to deſtroy the Plaintiff's Title. 4 Rep. 71. 6 Co. 15. He muſt ſhew the Title in himſelf, and he relies only on the Grant of the Lord.

But if Sarah Boreham took only a Life Eſtate, Leppingwell had a Title under the Heir at Law, and then the Grant of the Lord to him is ſubſtantiated; and though Poſſeſſion is ſufficient againſt a

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wrong-doer, yet it is not againſt the real owner, who has a Right of Entry, which would be the preſent Caſe, if Thomas, the Nephew, was the cuſtomary Heir: if he was not, then the Defendant is an entire ſtranger and wrong-doer, and the Plaintiff's Poſſeſſion would enable her to maintain the Action, and the Merits would be againſt the Defendant upon both the Queſtions; but as the Law is clearly with the Plaintiff on the 1ſt Queſtion, ſhe is entitled to the

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IN THE KING'S BENCH.

THE KING AGAINST ALMON.

Mr. Juſtice WILMOT *(a.)*

Hil. 5 Geo. III. 1765. The King againſt Almon.

THIS is an Application made to the Court by the Attorney General, for an Attachment againſt Mr. ALMON, for publiſhing a Pamphlet, containing many libellous paſſages upon this Court, and upon the Chief Juſtice for his Conduct both in Court and out of it: and it charges the Court, and particularly the Chief Juſtice, with having introduced a method of Proceeding to deprive the Subject of the benefit of the Habeas Corpus Act; and though the Chief Juſtice is named

(a) This Opinion was not delivered in Court, the Proſecution having been dropped, in conſequence, it is ſuppoſed, of the Reſignation of the then Attorney General, Sir Fletcher Norton; but it was thought to contain ſo much legal knowledge on an important ſubject, as to be worthy of being preſerved. The occaſion of it was a Motion in the Court of King's Bench, by the Attorney General, for an Attachment againſt Mr. ALMON, for publiſhing a Pamphlet, intituled, "A Letter concerning Libels, Warrants, "Seizure of Papers, &c. Printed for J. ALMON, Piccadilly, 1765."

In conſequence of this Motion, grounded on Affidavits of the above Pamphlet having been bought at the Shop of Mr. ALMON, in Piccadilly, a Rule was made for Mr. ALMON, to "ſhew Cauſe" why a Writ of Attachment ſhould not iſſue againſt him for his Contempt. In anſwer to theſe Affidavits Mr. Almon made an Affidavit, in which he expreſſed his "concern and ſurprize at this Charge, being no ways conſcious of having in "any act of his Life been guilty of the leaſt intentional diſreſpect towards that Court,

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named and marked out in that Paſſage, yet the whole Court is moſt manifeſtly, and in expreſs words, involved in it.

The Paſſage reflecting upon the Chief Juſtice for amending an Information out of Court, is in page 126, and is laid before the Court in this manner. Mr. Barlow, by Affidavit, informs the Court, that upon the 18th of February, he received directions from Mr. Wallace, to get an Information againſt Mr. Wilkes amended, by ſtriking out the word "Purport," and inſerting the word "Tenor:" that he applied to Lord Mansfield for a Summons, to ſhew Cauſe why it ſhould not be amended, and ſent two Copies of the Summons, one to Mr. Hughes, the Clerk in Court for the Defendant, and another to Mr. Phillips, the Solicitor for the Defendant, which he believes were left at their Houſes. That on Monday, the 2d of February, he attended Lord Mansfield, and there met Mr. Hughes and Mr. Phillips; and Lord Mansfield then aſked them what Objections they had to ſuch Amendment: that they ſaid they could not conſent to it; and that Lord Mansfield ſaid, he did not aſk their Conſent, but what their Objections were? and aſked, if it was not uſual, or the common Practice, to amend Informations? and read from a Book ſeveral Caſes of Amendments, and then made an Order for the Amendment; and Mr. Hughes confirms the Account given by Mr. Barlow, of what paſſed at Lord Mansfield's when this Amendment was made.

"nor does he now, nor did he ever apprehend or underſtand that the Paſſage or Extract "of the Pamphlet, intituled, "A Letter," &c. "was ſo meant or intended, or could be "ſo conſtrued."

As theſe Proceedings were afterwards dropped, they are not mentioned in the Reports of this Period; but it appears that this Opinion was prepared after the Argument on the Rule to "ſhew Cauſe," as it takes notice of the Arguments of Counſel, and of the Objection made to the granting of the Attachment.

But as the matter never came to a final Deciſion, it muſt be conſidered only as the Opinion of the Judge who gives it.

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The Paſſage in this Pamphlet repreſents this Amendment to have been made by Lord Mansfield, "officiouſly, arbitrarily, and illegally."

The Evidence laid before the Court, of Mr. ALMON's having publiſhed this Pamphlet, is an Affidavit made by David Bell, in which he ſwears that the Pamphlet was ſold and delivered to him at Mr. ALMON's Shop, by a Woman belonging to Mr. ALMON, and that he paid her 1*s.* 6*d.* for it.

Three Objections have been made to the granting this Attachment.

1ſt. That in the mode of Proſecution, the Fact, ſworn by Bell, doth not ſufficiently evidence a Publication of the Pamphlet by Mr. ALMON, and that his Privity to the Publication ought to be proved.

2dly. That to warrant this "ſummary" mode of Proceeding, the Contempt ought to be clear and certain; that the Scandal ought to be ſelf-evident and apparent, not to be made out by private Anecdotes and Inferences, or any nice ingenious ſubtle Interpretation; that it is the proper Province of a Jury to judge of the Application and Relation of a Libel; and that whether theſe Paſſages do or do not relate and apply to the Court, or the Chief Juſtice, would be much more proper for a Jury to exerciſe their Judgment upon than the Court.

3dly. But if both theſe Points ſhould be againſt them, then it is inſiſted upon, that under all the circumſtances of this Caſe, the Court ought not to proceed by way of Attachment, but leave the Offence to be proſecuted and puniſhed by Indictment or Information.

As to the 1ſt Objection. I cannot find out that any diſtinction has ever been taken between Attachments and Informations, as to the Evidence

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Evidence expected by the Court for granting them. Demonſtration is not required in either Caſe, but ſuch a degree of Probability, as warrants the mind to form a concluſion of the Truth of the Fact propoſed, and to act upon it.

The Fact, propoſed here, is the Publication of this Pamphlet by Mr. ALMON.

The Evidence is, that it was ſold in his Shop by a Woman belonging to him. What is the Inference that the mind draws from ſuch a Sale? That it was ſold under his Direction, for his Uſe, and with his Privity. Like all other probabilities, it may be anſwered and explained; but unleſs it is anſwered and explained, it riſes ſo near to a certainty, that it produces in the mind that kind of Aſſent which is called Aſſurance; and upon that foundation Courts of Juſtice, as well as private men, muſt reſt ſatisfied and contented as the beſt and only ſuccedaneum to Demonſtration; and this kind of Evidence has always been held ſufficient to induce the Court to grant Informations for Libels.

In the King and Roberts, Mich. 8 Geo. II. it was laid down by Lord Hardwicke and the Court, to be the conſtant Evidence of the Publication of a Libel, that the perſon bought it in the Defendant's Shop: and as to the Objection which was made to its being bought from one who appeared to be a Servant, and not the Maſter himſelf; and that there might be ſome combination between the Buyer and Seller, in order to injure the Maſter; it was ſaid, the proof of that lies upon the Maſter, if he would remove the general preſumption of its being ſold by his Privity and Direction; and that this ſpecies of Evidence has always been held ſufficient to induce the Court to grant an Information. It is alſo now eſtabliſhed and ſettled by a

multitude of Caſes which might be adduced, and an uniform Practice in purſuance of them, that this Evidence is ſufficient to prove a Publication by the Defendant, even upon a Trial.

If it be ſufficient to convict a man of Publication upon a Trial, "a fortiori," it muſt be ſufficient to found a Proceeding upon, which is ſo far from convicting, that it only calls upon the Party to anſwer the Charge, and defers the whole Trial of that Charge to his own Oath.

And as Mr. ALMON has made an Affidavit himſelf in this Caſe, and does not deny his Privity to the Sale of this Pamphlet, it fortifies the preſumption which the Law makes, and for theſe purpoſes very ſufficiently evidences the Publication of this Pamphlet by him.

As to the 2d Objection, which reſpects the Application of the Paſſages, it is admitted, and indeed it is upon very rational grounds now moſt clearly ſettled, that it is totally immaterial in what particular form or mode of expreſsion Calumny and Defamation are conveyed.

The uſe of Speaking and Writing, is to excite in the mind of the Hearer, or the Reader, the Idea entertained in the mind of the Speaker or Writer; and therefore, let the Speaker or Writer paint that idea how he will, and in what colours he pleaſes, ſtill, if it produces an idea of Calumny and Defamation in the minds of the perſons who hear or ſee it, it is a Picture which the Law forbids to be drawn under any form or under any diſguiſe whatſoever; and Courts of Juſtice have for many years ſaid, that they would not renounce their ſenſes upon ſuch occaſions, but would ſee with the ſame eyes that all other people do.

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It is totally immaterial what Terms are made uſe of, whether affirmative, negative, paſt, preſent, future, ironical, hypothetical, or interrogatory; if they convey Scandal, Judges are bound to underſtand it in the plain, popular, and obvious ſenſe which the words import, and not ſuffer the Slanderer to ſhelter himſelf by any deluſive colouring whatſoever.

But really there is no Colouring at all in this Caſe, except making uſe of the future Tenſe inſtead of the preterperfect.

The Paſſages, 122 to 126, *(a)* contain a direct, plain, explicit Charge upon this Court, of an Intention to defeat the Habeas Corpus Act,

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(a) " I hope we ſhall never ſee any Chief Juſtice, eſpecially in that great Court of criminal Proceſs, the King's Bench, who ſhall deny, or delay, the iſſuing one of theſe Writs (of Habeas Corpus) to any man who applies for it, but award the ſame inſtantly, upon the Prayer of any one, as a Writ of Right, to which the Subject is entitled for aſking, by motion of courſe, without any Affidavit whatſoever. In many Caſes, as, for example, in that of " cloſe" Confinement, it may be impoſſible for the Party either to ſpeak to a Friend, ſend a Letter, or make an Affidavit; and, conſequently, if either be required by the Court, it will be a virtual denial of the Writ; it is a means of defeating the Habeas Corpus Act. The Requiſition of an Affidavit, puts it likewiſe in the power of a Judge, to object to its Form or Contents, and to ſay the ſame is not full enough; and yet, before another can be had, the Party guilty of the violence, upon being apprized of what has paſſed, may, by means of this Delay, remove the Priſoner to ſome other place, or ſhuffle him into ſome other hands, nay, hurry him into a Ship and carry him to the Eaſt or Weſt Indies, and then all attempt for Redreſs will come too late, and be in vain. An Application to the King's Bench for an Habeas Corpus in Term-time, uſed to be eſteemed, I remember, a mere " Motion of courſe." " Our In-" heritance is right of Proceſs of the Law, as well as in judgment of the Law." The condition of the ſubject would be ſtill worſe, if any Chief Juſtice, inſtead of granting the Writ prayed for, ſhould force the Party into the taking of a Rule upon the Impriſoner, to ſhew cauſe why he detained the perſon impriſoned; and this laſt miſerable remedy would ſtill be rendered leſs adequate, if the perſon applying was obliged to give notice of ſuch Rule to the Solicitor of the Treaſury, as well as to the perſon impriſoning; and even this again would be ſtill made more grievous, tedious, and precarious, if the Judge ſhould

Act, by introducing a Rule to be attained by an Affidavit, inſtead of granting the Writ "of courſe," and averring that a man was two years obtaining his Liberty under one of theſe Rules. The Paſſages expreſsly mention the Chief Juſtice in that great Court of Criminal Proceſs, the King's Bench, in "apertâ Curiâ."

ſhould be critical upon the Affidavit of the ſervice of Notice, and be extremely rigid in its being moſt punctually ſet forth in every the minuteſt circumſtance. What a noble field for delay, evaſion, and final diſappointment, would this open to every committer of violence; and how eaſy would it be, in the mean time, to dodge the man impriſoned from place to place, and from hand to hand, ſo as to render it utterly impracticable for any friend to procure his enlargement. A bold and daring Miniſter might thus eaſily tranſport a troubleſome, prating fellow, to either India, long before any "Cauſe could be ſhewn" upon ſuch a Rule. I am informed, that a Freeholder, preſſed for a Soldier under a temporary Act of Parliament, was two years obtaining his Liberty under one of theſe Rules; although he did his utmoſt by Money and Counſel, during all the time, to puſh on the hearing of his Caſe upon the merits: indeed he had the great good fortune not to have his Regiment removed farther than from Falmouth to Carliſle, in the whole time; for, had it been ordered abroad, I do not ſee how he could have had any Relief at all, until the end of the war; before which he might have died of diſeaſes, or been knocked on the head by the enemy. But it would be even ſtill much worſe, if any Judge ſhould take it into his head for ſix months together, that Noblemen were ſo great as to be privileged from paying obedience to a Habeas Corpus at all."

"Or, if any Chief Juſtice, contrary to the uſage of Judges, who are to have no ears for any thing that is to come in Judgment before them, until the ſame is brought on judicially, ſhould, weeks before any Crown-trial, officiouſly ſend for the Proceedings to ſee whether they were legal, and upon diſcovering an Error on the Proſecutor's ſide, ſhould ſummon the Attorney of the other ſide, and tell him he muſt conſent to the ſetting right of this Error, to the end that the "tenor" of the pleading might be ſuch as Judgment could be pronounced thereupon; and, notwithſtanding the Attorney ſhould proteſt he could not conſent thereto upon the account of his Client, and that the ſame was a criminal Proſecution, and that ſuch alteration of the Record was not warranted by any adjudged Precedent, ſhould nevertheleſs arbitrarily direct it to be done, without either having the Point debated before himſelf by Counſel, or brought on before the whole Court for their Opinion; and that the Defendant, being found guilty by the Jury, ſhould be deprived, by ſuch Amendment, of taking advantage of the Error aforeſaid, in Arreſt of Judgment, which he might otherwiſe have done, and the ſame would have been fatal to the Proſecutor. &c. &c."

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And as the Chief Juſtice can neither deny nor delay the iſſuing of an Habeas Corpus, without the concurrence of the other Judges, it is imputing that denial or delaying to them. But it does not reſt there, for it ſays, "if ſpeaking to a Friend, ſending a Letter, or "making an Affidavit, be required by the Court, it will be a virtual "denial of the Writ;" which is ſaying that, by requiring an Affidavit, they have virtually denied the Writ; "that it is a means of "defeating the Habeas Corpus Act; that an Application for an "Habeas Corpus uſed to be a "Motion of courſe;" that the Condition "of the Subject would be ſtill worſe, if any Chief Juſtice, inſtead "of granting the Writ, ſhould force the Party into a Rule, and that "Notice of ſuch Rule ſhould be given to the Solicitor of the Treaſury; if any Judge ſhould be of opinion that Noblemen were "privileged from paying obedience to the Habeas Corpus; and that "a Peer could not be attached by the King's Bench, for treating the "Court with opprobrious language."

What Inuendo, Inference, Deduction, nice and ſubtle or ingenious Interpretation is to be made, for applying this to the Court and the Chief Juſtice? What Anecdote is to be known, unleſs the Proceedings in this Court are Anecdotes, and the Records of it are Secrets and Myſteries, impervious to human eyes, and unknown even to the Judges themſelves.

As to the other Paſſages relating to the Chief Juſtice amending the Information, the Application is equally obvious, direct, and neceſſary; for what Chief Juſtice can make Amendments in Criminal Proſecutions before trials in which the Crown is concerned, but the Chief Juſtice of the King's Bench?

* If

If the words "Lord Mansfield," had been printed in Capital Letters, it would not have pointed him out more viſibly to the Public, than the words "Chief Juſtice," applied to the Amendment of an Information; and where, from the manifeſt context of all the Paſſages relating to a Chief Juſtice, it is evident that the Chief Juſtice, mentioned in the firſt part of the Paſſage, page 123, is the ſame Perſon who is carried through all the Paſſages, and that is, the Chief Juſtice in that great Court of Criminal Proceſs, the Court of King's Bench.

Affidavits are only neceſſary where the Perſon does not appear with clearneſs and certainty upon the face of the Libel; but the Affidavit of the Chief Juſtice himſelf, or of the whole Legiſlature put together, could not have connected the Perſon and the Paſſage together more ſtrongly than the words themſelves do: and the Affidavit made by Mr. Barlow and Mr. Hughes does not fix the Relation, or add the leaſt additional Evidence, in reſpect of the Alluſion, but only to ſhew, "ex abundanti," that there was not the leaſt foundation for any part of the aſſertion.

The Affidavit only ſhews that it was a malignant Fiction, formed upon a Tranſaction which did paſs before the Chief Juſtice, and a libellous Miſrepreſentation of it; and, if no ſuch Affidavit had been made, it would have appeared, upon the face of the Paper, to have been an infamous Aſperſion and Libel, unrelated to any tranſaction whatſoever; and there is nothing for a Jury to determine, but whether the Court of King's Bench is the Court of King's Bench, and whether Lord Mansfield is the Chief Juſtice in it.

But ſuppoſe there were Facts upon which a Jury might exerciſe their Judgment; is it not half the Buſineſs of this Court to examine

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and try thoſe Facts upon Applications for Attachments? And though I wiſh as well, and have as high an opinion of Trials by Jury, as any man has or ever had; and where Facts are doubtful, this Court often directs Iſſues to aſcertain them; yet Attachments are only Proceſs to bring Parties into Court; and where Facts are clear, plain, and as manifeſt as Words can make them, to what end, intent, and purpoſe, are we to deſire any further Information or Satisfaction about them?

I think no Affidavit is neceſſary to connect the Paſſages either with the Court or the Chief Juſtice, but that the Relation is ſelf-evident, and appears to a demonſtration upon the face of the Pamphlet.

The third and laſt Objection is, that, ſuppoſing this Pamphlet to contain Paſſages libelling the Court or the Chief Juſtice, yet that it is not proper for this Court to proceed againſt the Delinquent by way of Attachment, but that it ſhould leave him to be proſecuted by Indictment or Information.

There are two Points to be conſidered under this Objection.

The firſt reſpects the Paſſages affecting the Court, and the Chief Juſtice acting in Court: The other reſpects the Paſſage reflecting upon the Chief Juſtice for the Amendment made out of Court.

I will firſt conſider what has been ſaid with reſpect to Attachments in general, and the diſtinction made between the propriety of applying them to one ſpecies of Contempt and not to another; becauſe that part of the Argument goes to all the Paſſages in the Pamphlet, whether they reflect upon the Judges for what they do in the Court, or in their Judicial Capacity out of it.

I will then conſider the other Point about the Amendment made by the Chief Juſtice out of Court.

It

It has been argued, that the mode of Proceeding by Attachment is an Invaſion upon the ancient ſimplicity of the Law; that it took its riſe from the Statute of Weſtminſter, Ch. 2; and Gilbert's Hiſtory of the Practice of the Court of Common Pleas, p. 20, in the firſt Edition, is cited to prove that Poſition. And it is ſaid, that Act only applies to Perſons reſiſting Proceſs; and though this mode of Proceeding is very proper to remove Obſtructions to the Execution of Proceſs, or to any contumelious Treatment of it, or to any Contempt to the Authority of the Court; yet that Papers reflecting merely upon the Qualities of Judges themſelves, are not the proper objects of an Attachment; that Judges have proper Remedies to recover a Satisfaction for ſuch Reflections by Actions of "Scandalum Magnatum;" and, that in the Caſe of a Peer, the Houſe of Lords may be applied to for a Breach of Privilege; that ſuch Libellers may be brought to puniſhment by Indictment or Information; that there are but few Inſtances of this ſort upon Libels on Courts or Judges; that the Common Pleas lately refuſed to do it; that Libels of this kind have been proſecuted by Actions and Indictments; and that Attachments ought not to be extended to Libels of this nature; becauſe Judges would be determining in their own Cauſe; and that it is more proper for a Jury to determine "quo animo" ſuch Libels were publiſhed.

As to the origin of Attachments, I think they did not take their Riſe from the Statute of Weſtminſter, Ch. 2; the Paſſage out of Gilbert does not prove it; but he only ſays, "the original of Commitments for Contempt "ſeems" to be derived from this Statute;" but read the Paragraph through, and the end contradicts the "ſeeming" mentioned in the beginning of it, and ſhews that it was a part of the

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Law of the Land to commit for Contempt, confirmed by this Statute; and indeed, when that Act of Parliament is read, it is impoſſible to draw the commencement of ſuch a Proceeding out of it: it impowers the Sheriff to impriſon Perſons reſiſting Proceſs; but has no more to do with giving Courts of Juſtice a Power to vindicate their own Dignity, than any other Chapter in that Act of Parliament.

The Power, which the Courts in Weſtminſter Hall have of vindicating their own Authority, is coeval with their firſt Foundation and Inſtitution; it is a neceſſary Incident to every Court of Juſtice, whether of Record or not, to fine and impriſon for a Contempt to the Court, acted in the face of it, 1 Vent. 1. And the iſſuing of Attachments by the Supreme Courts of Juſtice in Weſtminſter Hall, for Contempts out of Court, ſtands upon the ſame immemorial Uſage as ſupports the whole Fabrick of the Common Law; it is as much the "Lex Terræ," and within the exception of Magna Charta, as the iſſuing any other Legal Proceſs whatſoever.

I have examined very carefully to ſee if I could find out any veſtiges or traces of its Introduction, but can find none. It is as ancient as any other part of the Common Law; there is no priority or poſteriority to be diſcovered about it, and therefore cannot be ſaid to invade the Common Law, but to act in an alliance and friendly conjunction with every other Proviſion which the wiſdom of our Anceſtors has eſtabliſhed for the general good of Society. And though I do not mean to compare and contraſt Attachments with Trials by Jury, yet Truth compels me to ſay, that the mode of proceeding by Attachment ſtands upon the very ſame foundation and baſis as Trials by Jury do,—immemorial Uſage and Practice; it is a Conſtitutional Remedy

Remedy in particular Caſes, and the Judges, in thoſe Caſes, are as much bound to give an activity to this part of the Law as to any other part of it. Indeed it is admitted that Attachments are very properly granted for reſiſtance of Proceſs, or a contumelious treatment of it, or any violence or abuſe of the Miniſters, or others, employed to execute it. But it is ſaid that the courſe of Juſtice in thoſe Caſes is obſtructed, and the Obſtruction muſt be inſtantly removed; that there is no ſuch neceſſity in the caſe of Libels upon Courts or Judges, which may wait for the ordinary method of Proſecution without any inconvenience whatſoever. But when the nature of the Offence of libelling Judges for what they do in their Judicial Capacities, either in Court or out of Court, comes to be conſidered, it does, in my Opinion, become more proper for an Attachment than any other Caſe whatſoever.

By our Conſtitution, the King is the Fountain of every Species of Juſtice, which is adminiſtered in this Kingdom. 12 Co. 25. The King is "de jure" to diſtribute Juſtice to all his ſubjects; and, becauſe he cannot do it himſelf to all perſons, he delegates his Power to his Judges, who have the cuſtody and guard of the King's Oath, and ſit in the Seat of the King "concerning his Juſtice."

The Arraignment of the Juſtice of the Judges, is arraigning the King's Juſtice; it is an Impeachment of his wiſdom and goodneſs in the choice of his Judges, and excites in the Minds of the People a general Diſſatisfaction with all Judicial Determinations, and indiſpoſes their minds to obey them; and whenever men's Allegiance to the Laws is ſo fundamentally ſhaken, it is the moſt fatal and moſt dangerous Obſtruction of Juſtice, and, in my Opinion, calls out for a more rapid and immediate Redreſs than any other Obſtruction whatſoever;

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whatſoever; not for the ſake of the Judges, as private Individuals, but becauſe they are the Channels by which the King's Juſtice is conveyed to the People. To be impartial, and to be univerſally thought ſo, are both abſolutely neceſſary for the giving Juſtice that free, open, and uninterrupted current, which it has, for many ages, found all over this Kingdom, and which ſo eminently diſtinguiſhes and exalts it above all Nations upon the Earth.

In the moral Eſtimation of the Offence, and in every public conſequence ariſing from it, what an infinite diſproportion is there between ſpeaking contumelious words of the Rules of the Court, for which Attachments are granted conſtantly, and coolly and deliberately printing the moſt virulent and malignant Scandal which fancy could ſuggeſt upon the Judges themſelves. It ſeems to be material to fix the ideas of the words, "Authority" and "Contempt of the Court," to ſpeak with preciſion upon the Queſtion.

By the word "Court," I mean the Judges who conſtitute it, and who are intruſted by the Conſtitution with a portion of Juriſdiction defined and marked out by the Common Law, or Acts of Parliament. "Contempt of the Court" involves two Ideas: Contempt of their Power, and Contempt of their Authority. The word "Autho-" "rity" is frequently uſed to expreſs both the right of declaring the Law, which is properly called Juriſdiction, and of enforcing obedience to it, in which ſenſe it is equivalent to the word Power: but by the word "Authority," I do not mean that coercive Power of the Judges, but the Deference and Reſpect which is paid to them and their Acts, from an Opinion of their Juſtice and Integrity.

Livy uſes it according to my idea of the word, in his character of Evander:—"Authoritate magis quam Imperio pollebat:" it is not "Imperium;"

" Imperium ;" it is not the coercive Power of the Court; but it is Homage and Obedience rendered to the Court, from the Opinion of the qualities of the Judges who compoſe it: It is a confidence in their Wiſdom and Integrity, that the Power they have is applied to the Purpoſe for which it was depoſited in their hands; that Authority acts as the great auxiliary of their Power, and for that reaſon the Conſtitution gives them this compendious mode of Proceeding againſt all who ſhall endeavour to impair and abate it; and therefore every inſtance of an Attachment for contumelious words, ſpoken of a Rule of the Court (of which there are great many) is a Caſe in point to warrant an Attachment in the preſent Caſe, where a Rule of Court is the object of the defamation; and it would be a very ſtrange thing that Judges, acting in the King's Supreme Court of Juſtice in Weſtminſter Hall, ſhould not be under the ſame protection as a Bailiff's Follower, executing the Proceſs which thoſe Judges iſſue: it is not their own Cauſe, but the Cauſe of the Public, which they are vindicating, at the inſtance of the Public; for I do not think that Courts of Juſtice are to take their Complaints up of themſelves: it muſt be left to His Majeſty, who ſuſtains the perſon of the Public, to determine whether the Offence merits a public notice and animadverſion; and in this ſtate of the Proceedings, they are only putting the Complaint into a mode of Trial, where the Party's own Oath will acquit him; and in that reſpect it is certainly a more favourable Trial than any other: for he cannot be convicted if he is innocent, which, by falſe Evidence, he may be by a Jury; and if he cannot acquit himſelf, he is but juſt in the ſame ſituation as he would be in, if he was convicted upon an Indictment or an Information; for the Court muſt ſet the Puniſhment in one Caſe as well as the other:

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they do not try him in either Caſe; he tries himſelf in one Caſe, and the Jury try him in the other.

An Action of "Scandalum Magnatum" is only to redreſs the private Injury: Compenſation, and not Puniſhment, is the object of it; and though ſome Judges may have ſought pecuniary Satisfaction, yet others have thought more liberally, and diſregarded all private emolument or gratification for the perſonal Injury, and reſented the Indignity as the Cauſe of the Public; and the Conduct of the Court of Common Pleas, in reſpect of the Libel publiſhed by the Court Martial, is an Authority in point upon this part of the Caſe.

As to proceeding in the Houſe of Lords for a Breach of Privilege, the Scandal upon the Noble Lord does not affect him in the character of a Peer, but as the Chief Juſtice of this Court; and if it did, I cannot think it a more favourable mode of Proſecution than an Attachment, where his own Oath will acquit him. As to leaving ſuch Libels to be proſecuted by Indictment or Information, that Juries may judge, "quo animo," they were written or publiſhed; I am as great a friend to Trials of Facts by a Jury, and would ſtep as far to ſupport them as any Judge who ever did, or now does, ſit in Weſtminſter Hall; but if to deter men from offering any Indignities to Courts of Juſtice, and to preſerve their Luſtre and Dignity, it is a part of the legal Syſtem of Juſtice in this Kingdom, that the Court ſhould call upon the Delinquents to anſwer for ſuch Indignities, in a ſummary manner, by Attachment, we are as much bound to execute this part of the Syſtem as any other; for we muſt take the whole Syſtem together, and conſider all the ſeveral parts as ſupporting one another, and as acting in combination together, to attain the only end and object of all Laws, the ſafety and ſecurity of the People.

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The Trial by Jury is one part of that Syſtem; the puniſhing Contempts of the Court by Attachment is another; we muſt not confound the modes of Proceeding, and try Contempts by Juries, and Murders by Attachment. We muſt give that energy to each, which the Conſtitution preſcribes. In many Caſes, we may not ſee the correſpondence and dependance which one part of the Syſtem has and bears to another; but we muſt pay that deference to the Wiſdom of many ages as to preſume it; and I am ſure it wants no great intuition to ſee, that Trials by Juries will be buried in the ſame grave with the Authority of the Courts who are to preſide over them.

The Conſtitution has provided very apt and proper Remedies for correcting and rectifying the involuntary miſtakes of Judges, and for puniſhing and removing them for any voluntary perverſions of Juſtice. But if their Authority is to be trampled upon by Pamphleteers and News-writers, and the People are to be told that the Power, given to the Judges for their Protection, is proſtituted to their Deſtruction, the Court may retain its Power ſome little time, but I am ſure it will inſtantly loſe all its Authority; and the Power of the Court will not long ſurvive the Authority of it: Is it poſſible to ſtab that Authority more fatally than by charging the Court, and more particularly the Chief Juſtice, with having introduced a Rule to ſubvert the Conſtitutional Liberty of the People? a greater Scandal could not be publiſhed.

A Rule was firſt made in Hilary Term, 1757, in the Caſe of the King and Charles Thacker, and was calculated entirely to meet the Caſe of perſons preſſed under the 29 Geo. II. c. 4.

It had been doubted, (not by the Court,) upon former Preſs Acts, whether the Judgment of the Commiſſioners, as to the fitneſs of the

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men impreſſed, was not intended by the Legiſlature to be final; but as it was an Authority only in the Commiſſioners, Complaints were made of their exceeding and abuſing it, and Writs of Habeas Corpus granted; but the Facts, ſtated in the Return of theſe Writs, being only controvertible in an action for a falſe Return, according to the Opinion of the Houſe of Lords in the year 1759, great delay muſt have ariſen in Caſes which required immediate diſpatch; and in caſe no Return was made by the Officer, but that he had the Party in his Cuſtody, and had him ready in Court, according to the command of the Writ (and as he was a ſtranger to the propriety of the Preſs, he could ſcarcely make any other,) all the Preſſed men in the Army muſt have been diſcharged, to the manifeſt hazard of the Nation, who had been under a neceſſity of having recourſe to that Expedient for recruiting the Army; but ſtill, in that Caſe, or if the Man had not been in actual Cuſtody, but at large, and had left the Army without a military Diſmiſſion, it muſt have been, in both Caſes, at the peril of his being afterwards tried and puniſhed as a Deſerter, in Caſe he was a proper object of the Preſs; and therefore, to give a full, complete, and adequate Relief to the Party preſſed, and to give the Act of Parliament that Operation which the Legiſlature intended, and which that Supreme Law, the ſafety of the People, required, and which muſt have been endangered by diſcharging all the preſſed men, (becauſe the perſons, who made the Returns, were, and from the nature of the Caſe, muſt have been, ſtrangers to the Facts which did or did not make them objects of the Preſs,) the Court, in Hilary Term, 1757, firſt made a Rule upon the Commiſſioners under the Act of Parliament, as having exceeded their Authority, to ſhew Cauſe why the Party ſhould not be diſcharged out of the Cuſtody of Mr. Hayward,

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the Keeper of the Savoy, where Thacker was confined; and that Hayward ſhould not ſuffer him to be taken or ſent away, until the Court ſhould further determine therein, and that Notice of that Rule ſhould be given to the Solicitor of His Majeſty Treaſury in the mean time. By this Rule, the Queſtion of the Fitneſs of the Man, viz. whether he was an object of the Act or not, was brought before the Court much more expeditiouſly than it could have been done by an Habeas Corpus, where the Facts of the Return could not be controverted by Affidavits. He was ſecured, by the proviſion in the Rule, from being taken or ſent away in the mean time; and by making the Crown and the Commiſſioners Parties to the Rule, the Queſtion received ſuch a complete Determination, as delivered the Party abſolutely from the condition of a Soldier, in caſe it was determined for him; and if it was determined againſt him, he might ſtill have recourſe to an Habeas Corpus, and take the ſenſe of a Jury upon the Facts which ſhould be contained in the Return to that Writ; and no Habeas Corpus was ever denied to any body who prayed it upon a proper foundation. This Rule was offered to the People as a more beneficial remedy, but was not impoſed upon them in the place of the Habeas Corpus. The manifeſt and apparent utility of it, made it the option of the Bar in many ſubſequent Caſes, in preference to the Writ of Habeas Corpus.

I was not in Court that Term the Rule was made, but I was informed of it, and moſt cordially approved of it. I mention the circumſtance of my not being here at that time for two Reaſons: 1ſt. To expreſs my ſorrow that I had not a ſhare in the Formation of it. 2dly. To avoid any imputation of applauding myſelf in what I am going to ſay about it.

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In more temperate Times, this Rule would have been treated as a Heaven-directed Thought for the better ſupporting the Liberty of the People, in the execution of an Act of Parliament, which breaks in upon that Equality which the Law moſt anxiouſly affects to eſtabliſh for all who live under this Government, and which nothing but the neceſſities of the State can ever reconcile to the Genius of a Free Conſtitution. It was the beſt expedient which the moſt conſummate prudence, and the warmeſt wiſh for the happineſs of the People, could have invented, to give the State all the benefit which the Legiſlature really meant they ſhould receive from that Law; and at the ſame time to guard Individuals againſt any abuſe of it; and in times to come, it will be one great memorial of the zeal and affection of the Judges who made it, for the Liberties of the People.

It was ſaid, that this Pamphlet was an anſwer to a libellous Pamphlet on another Court: I never read any Pamphlets, and therefore do not know what that Pamphlet was; but as to litigated Queſtions between the two Courts, on the Habeas Corpus Act, I know of none; and a Libel upon one Court of Juſtice, is a very odd way of anſwering a Libel upon another: I ſhould rather think that both the Pamphlets came out of the ſame Quiver; I am ſure the ſame malignant Spirit, the ſame evil Genius of this nation, guides the hand of the perſons who calumniate any Court of Juſtice: and as to the Court of Common Pleas not taking up a Complaint of this kind, what was the nature of that Complaint? If properly proved, or how it came before them, is not ſtated: but I am fully perſuaded, from my knowledge of their Wiſdom and Juſtice, that if ſuch a Complaint as this had been laid before them, they would have acted as we do upon it.

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If an Attachment is a Conſtitutional mode of Proceeding for Libels upon Courts of Juſtice, they muſt be competent to the Queſtion of "Quo animo" they are publiſhed; and eſpecially in this ſtage of the Proceeding, which is only to bring the Party into Court to tell his own Story. It is the Intention which, in all Caſes, conſtitutes the Offence. "Actus non facit reum, niſi mens ſit rea." It would be a contradiction in terms to admit Courts to have a Cognizance of the Offence, and yet not admit them to be Judges of the only ingredient which makes it ſo.

As to the Paſſages relating to the Amendment made by the Chief Juſtice out of Court, there is no neceſſity of giving any Opinion upon that part of the Caſe, as the Attachment ought to go for the other paſſages reflecting upon the Court and the Chief Juſtice, for acts charged upon him as done in Court; but as that Point has been argued very elaborately, I will give my opinion upon it. The Legality of this Amendment was never controverted: it could not be controverted: it was founded upon Precedents, and upon that immutable principle of all Practice, the bringing the real merits of the Caſe in queſtion before the Court: the whole doctrine of Amendments turns upon that principle.

The Objection to granting the Attachment upon this Paſſage is, that it reſpects the Chief Juſtice only, and neither reflects upon the Court, nor the Proceſs of the Court; that Orders made by Judges at their Chambers cannot be enforced by Attachment, till they are made Orders of the Court; and that the diſobedience muſt be ſubſequent to their being made Orders of the Court; and a doubt has been rather hinted at than made, as to the legality of Orders made by

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by Judges at their Houſes or Chambers. And the Paſſage, in 2 Inſt. 103. was mentioned as condemning this Practice.

When the Practice firſt began I cannot find out; my Search and Inquiries have been as fruitleſs and ineffectual in that reſpect as Mr. Dunning's. Popham, 180.—One hundred and forty years ago, an Order was made by two Judges in Vacation, to ſtay a Judgment:—a very extraordinary interpoſition, but no complaint of it as illegal. But whenever it began, it ſtands upon too firm a baſis to be now ſhaken;—conſtant immemorial Uſage, ſanctified and recogniſed by the Courts of Weſtminſter Hall, and in many inſtances by the Legiſlature; and it is now become as much a part of the Law of the Land, as any other courſe of Practice which Cuſtom has introduced and eſtabliſhed: but though difficult to find out when it was introduced, yet it is very eaſy to ſee why it was introduced—for the eaſe and convenience of the Suitors of the Court;—to accommodate them at a much eaſier expence, and with leſs trouble, in a great variety of Caſes, and eſpecially in Vacation-time, when they could not have acceſs to the Court; and when there was a great multiplicity of buſineſs, the ſaving of the time of the Court in adjuſting trifling matters, which might be ſo much better employed in momentous ones, was no inconſiderable motive towards eſtabliſhing it. And ſtill, it is the buſineſs of the Court, which is done at Chambers; that is, it is buſineſs which muſt be done in Court, if it could not be done at Chambers.

And the Paſſage in Lord Coke, 2 Inſt. 103. when duly conſidered, relates only to Rules, Orders, Awards, and Judgments, made at Chambers, "ex parte;" where a man may loſe his Cauſe, or receive great prejudice or delay, in his abſence, for want of Defence; and

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the Paſſage, cited by him out of Seneca, very fully explains Lord Coke's meaning to relate to Orders or Rules, " parte alterâ inauditâ:" whereas, Judges never make Orders in Chambers, without hearing both Parties, or giving them an opportunity of being heard. And there is nothing in the Conſtitution of the Court, which forbids the buſineſs of it being done by one Judge; for one Judge, ſitting in Court, has the Authority of the whole Court; and a Libel upon him, would be a Libel upon the Court in the ſtricteſt ſenſe of the word; and certainly a Libel upon a ſingle Judge, for an Opinion given in Court, controuled by the other three Judges, although it could never be called a Libel upon the Court, yet would be a Contempt of the Court, and be proper for an Attachment; and therefore the Queſtion reſolves itſelf at laſt into this ſingle Point, Whether a Judge, making an Order at his Houſe or Chambers, is not acting in his Judicial Capacity as a Judge of this Court, and both his Perſon and Character under the ſame Protection, as if he was ſitting by himſelf in Court? It is conceded that an Act of violence upon his Perſon, when he was making ſuch an Order, would be a Contempt puniſhable by Attachment; upon what principle? for ſtriking a Judge in walking along the Streets, would not be a Contempt of the Court. The reaſon therefore muſt be, that he is in the exerciſe of his Office, and diſcharging the function of a Judge of this Court; and if his Perſon is under this Protection, why ſhould not his Character be under the ſame Protection? It is not for the ſake of the Individual, but for the ſake of the Public, that his Perſon is under ſuch Protection; and in reſpect of the Public, the imputing Corruption and the perverſion of Juſtice to him, in an Order made by him at his Chambers, is attended with much more miſ-

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chievous conſequences than a Blow; and therefore the reaſon of Proceeding in this ſummary manner, applies with equal, if not ſuperior, force, to one Caſe as well as the other; there is no greater obſtruction to the execution of Juſtice from the ſtriking a Judge, than from the abuſing him, becauſe his Order lies open to be enforced or diſcharged, whether the Judge is ſtruck or abuſed for making it.

The greateſt Objection upon this part of the Caſe has been, that this Court will not enforce obedience to a Judge's Order, by an Attachment, before it is made a Rule of Court; and that the Refuſal to perform it muſt be ſubſequent to its being made a Rule of Court; and from thence it has been inferred, that it can be no Contempt of the Court to libel a Judge for making an Order, becauſe it would be no Contempt of the Court to diſobey it. But, upon Conſideration, I think the inference is not a juſt one.

The Right of the Court to controul theſe Orders is to preſerve a uniformity of Practice, and to prevent any claſhing which might ariſe from four diſtinct and ſeparate Exertions of the ſame Juriſdiction. The refuſing to iſſue an Attachment for the Breach of ſuch an Order, before it is made an Order of the Court, was founded upon the ſame Principle: We will not enforce Obedience to it till we have adopted it; but that Proviſion only reſpects the effect of the Order when made, and does not the leaſt apply to the Capacity or Character in which the Judge makes it. He is ſtill opening and exerciſing the Juriſdiction of the Court, and is doing the Buſineſs which muſt otherwiſe be done in Court, exactly in the ſame manner as we do at the Side Bar; and ſurely a Libel upon the Judges for what they do at the Side Bar, within a few yards of the Court, would be as much the object of an Attachment as for any thing done in Court.

Court. Cuſtom legitimates the Practice at Chambers, as much as at the Side Bar; and Cuſtom may qualify and modify the Acts they do in both places.

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But ſtill they are emanations of Judicial Power, and whether they have more or leſs weight, they are Acts done by the Judge in the ſame Capacity and Character in which he ſits here; and whether he is ſwearing an Affidavit out of Court, or pronouncing a ſolemn Opinion in Court, the Reaſon of reſenting the Indignity is the ſame, and "ubi eadem eſt ratio, ibi idem eſt jus."

It may perhaps merit a leſs Puniſhment to libel a ſingle Judge in Court or out of Court, than to libel the whole Court; but the Quantum of the Offence does not vary the mode of proſecuting it; it is an Offence "ejuſdem generis" although "inferioris gradus:" And I cannot explore a ſingle reaſon which can be urged to cover the Judges in Court againſt Calumny and Detraction for what they do there, which does not hold equally true, though in a leſs degree, when applied to what they do in their Judicial Capacities out of Court: The Quantum of the offence is different, but the Quality of the Offence is the ſame.

Suppoſe the Pamphlet had charged all the Judges with Corruption in making four Orders in different Cauſes, it would have been a greater offence than charging one: but if it is not a proper mode of Proceeding in the Caſe of a ſingle Judge, it would not be proper in the Caſe of the Four; for though the Libel would, in that Caſe, take in the whole Court, yet if the Reaſon which is urged, of the inefficacy of their Orders till made Rules of Court, is ſufficient to take them out of the Protection of the Court in the Caſe of one Judge, it muſt hold in the Caſe I mention; for each Order may afterwards be con-

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trouled by the other Judges, when they come to ſit collectively together as a Court.—See the conſequence: If a Bailiff's Follower, at the time of executing a Proceſs to arreſt a man, ſhould be called a Rogue and abuſed, the Court is to grant an Attachment; but if the Four Perſons whom the King appointed to execute one of the nobleſt branches of his Regal Function, which the Uſage ſays may be done out of Court as well as in it, are repreſented to the People as acting in their Judicial Capacities out of Court corruptly, illegally, or oppreſſively, they are not to be under the ſame Protection as a Bailiff's Follower; but the Chief Juſtices and Judges of this Court muſt wait at the Door of the Grand Jury Chamber, with their Indictments in their Hands, and afterwards attend the Trial, which muſt ſtill be before one of themſelves, in order to get at that Juſtice which the meaneſt perſon in the Kingdom, acting under their Authority, has a right to, in the firſt inſtance, by an Attachment.

If the Practice of making Orders at Chambers is a legal one, the Protection muſt and ought to follow it. If the People are told that the Judges act unjuſtly and impiouſly at Chambers, can they think that they act otherwiſe when they ſit here? Does not the Scandal follow them into this Court, and mark them out as objects for the finger of Scorn to point at? Would it not, muſt it not, neceſſarily bring this Court into Contempt, to ſay, the Judges at their Chambers make Orders or Rules corruptly? The difference between the force, the weight, and the energy of an Order and of a Rule, reſpects only the mode of executing them; but the imputing Corruption to the Judges who made either, equally murders their Fame, which is the vital part of their Authority when they ſit here; and really in every ſhape which this Queſtion preſents itſelf to my underſtanding, I can make

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no difference between a Judge acting in Court, or Judicially out of it, but that he has not the ſame plenitude of Power in the one caſe which he has in the other. But ſtill he acts by virtue of the Patent conſtituting him a Judge of this Court, and of the Power which the Law gives him in that Character and Capacity. When he iſſues his Warrant as a Conſervator of the Peace, the Court puniſhes the Officer, who diſobeys it, by Attachment: Why?—Becauſe it is the act of a Judge in his Judicial Capacity; indeed it is an Obſtruction to Proceſs in that particular Complaint. But ſuppoſe he was calumniated for iſſuing ſuch a Warrant, would not the Court grant an Attachment for it?

The Court of Chancery has always puniſhed the abuſe of their Maſters, or of Commiſſioners of Bankrupt, whilſt acting in the execution of their Offices, in this ſummary manner, by Attachment; and I ſhould think a Libel upon them, or upon the Maſter of the Crown Office, or on the Civil ſide, for acts done by them in their Official Capacities, would be within the reach and reaſon of this mode of Proceeding. It is the Buſineſs of the Court, tranſacted by their Officers; and though under the Controul of the Court, that only reſpects the Effects of what they do, and not the Capacity in which they do it.

Perhaps it may be ſaid, though Attachments are granted for the abuſe of Officers in the actual Service of Proceſs, yet never for a Libel upon them for what they have done in that Capacity; and therefore no Argument can be drawn from the Practice of iſſuing Attachments in favour of Bailiffs abuſed in actual Service, any further than whilſt a Judge is in the actual Execution of his Office: but the Principles upon which the Court proceeds, in granting Attach-

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ments for abuſing Bailiffs in the execution of Proceſs, and abuſing Courts for their Judgments, muſt be attended to, in order to find out the difference between the Caſe of libelling a Bailiff, and libelling a Judge of the Court.

The Principle upon which Attachments are granted, in reſpect of Bailiffs, is to facilitate the Execution of the Law, by giving a ſummary and immediate Redreſs and Protection to the Perſons who undertake it. The Law conſiders it as a Contempt of the Authority of the Court, to abuſe and vilify the Perſon who is acting under it.

But the Principle upon which Attachments iſſue for Libels upon Courts, is of a more enlarged and important nature,—it is to keep a blaze of Glory around them, and to deter people from attempting to render them contemptible in the eyes of the Public.

Bailiffs are neither appointed by the King nor the Court; a Libel upon them terminates only in the Defamation of a private Individual: it is only telling the People, that a perſon employed to execute Proceſs has abuſed his Authority. But a Libel upon a Court is a Reflection upon the King, and telling the People that the Adminiſtration of Juſtice is in weak or corrupt hands; that the Fountain of Juſtice itſelf is tainted, and, conſequently, that Judgments, which ſtream out of that Fountain, muſt be impure and contaminated.

The Authority of the Court is contemned by abuſing a Bailiff in the actual Service of Proceſs: but the Juſtice of the Court is not arraigned, nor is the Court rendered contemptible in the eyes of the People by imputing miſbehaviour to him; and therefore an Attachment for a Libel upon a Judge for what he does at Chambers, does not proceed upon any Principle analogous to the Caſe of a Libel upon a Bailiff, but falls directly within the Principle of libelling the

Court, which is imputing to the King a Breach of that Oath, which he takes at the Coronation, to "adminiſter Juſtice to his people;" and a Judge, at his Chambers, is as much in the Adminiſtration of that Juſtice, as when he is in Court, though his Acts have not the ſame efficacy as the Acts of the whole Court; and Orders for Amendments do in ſome reſpects differ materially from Mandatory Orders, enjoining a third perſon to pay money or perform any particular act; for Obedience cannot be enforced to ſuch Mandatory Orders, till the Court has expreſsly recognized them; but Orders for Amendments require no Act of the Court to authenticate them. When the Alteration is made in purſuance of ſuch an Order, and there is no Application to diſcharge ſuch an Order, but it is acquieſced in by all Parties, it becomes the Act of the whole Court; and the Part amended is as much a part of the Record of the Court as any other part of it; and when this Pamphlet was printed, the Record had been amended in purſuance of the Order made by the Chief Juſtice; and therefore to every intent and purpoſe the Amendment had been adopted, recognized, and was become the Act of the Court, by the acquieſcence of the Parties, as emphatically and effectually, as if it had been originally ordered by the Court.

(b) Vide note *(a)* p. 243. alſo the Caſe of Rex *v.* John Wilkes, Eſquire, Hil. Term. 10 Geo. III. 4 Bur. p. 2527. where the ſubject of Amendments, made out of Court, is fully diſcuſſed.

IN THE COMMON PLEAS.

ROE, on the Demiſe of GEORGE DODSON, Eſq;

AGAINST

GREW and Others.—In Ejectment.

Hil. 7 Geo. III. 1767. 2 Wilſon, 322.

Dodſon againſt Grew and Others.

THIS was a Caſe on an Ejectment for the Recovery of certain Lands in the County of Middleſex, which was tried before Lord CAMDEN at the Sittings after laſt Eaſter Term, whereby it appeared—

That DANIEL DODSON was ſeiſed in Fee of the Premiſes in queſtion, and deviſed them in theſe Words; viz.

" Item. I give, deviſe, and bequeath unto my Nephew, GEORGE " GREW, All that my Manſion-houſe or Dwelling, with the Out- " houſes, Stables, Buildings, Orchards, Gardens, and Lands there- " to belonging, ſituate and being at Waltham Croſs, in the ſaid " County of Hertford, now in my own Poſſeſſion, and uſed there- " with: And alſo all thoſe my Meadow lands in Fowley, in the " Pariſh of Cheſhunt, in the ſaid County of Hertford, alſo in my " own Poſſeſſion: And alſo all that my one cloſe of Paſture land, in " Waltham Croſs aforeſaid, now in the Poſſeſſion of William Hunt: " And alſo all thoſe my three acres of common Field Land, lying and " being in Brickwall field, Swan field, and Whitehorſe field, in " Waltham Croſs aforeſaid, now in the poſſeſſion of myſelf and the " ſaid William Hunt: And alſo all thoſe my three acres of land, " lying

" lying and being in Bellſmore Lane, in the Pariſh of Enfield, and " County of Middleſex; and all other my lands, tenements, and " hereditaments in Enfield aforeſaid: And alſo all thoſe my Cham- " bers in Lincoln's Inn, No. 5, now in my own Poſſeſſion, in the " ſaid County of Middleſex:—To HOLD all and every the aforeſaid " Meſſuage, Lands, Tenements, Hereditaments, Chambers, and " Premiſes, with their and every of their Appurtenances, unto him " the ſaid GEORGE GREW for and during the term of his natural " life; and from and after his deceaſe, to the uſe of the iſſue male of " his body lawfully to be begotten, and the heirs male of the body of " ſuch iſſue male; and for want of ſuch iſſue male, then I give all " and every the aforeſaid Premiſes unto my nephew George Dodſon, " his heirs and aſſigns for ever."

THAT in the Deviſe to GEORGE GREW, the words " heirs male of " his body" were originally written, but that the word " heirs" was ſcratched out, and the word " iſſue" inſerted in its ſtead, in the ſame hand with the body of the Will, but in different ink.

THAT GEORGE DODSON, the Deviſee in remainder in the ſaid Will, was GEORGE DODSON, the Leſſor of the Plaintiff.

THAT the Teſtator deviſed other Eſtates to the ſaid Leſſor of the Plaintiff in fee.

THAT GEORGE GREW, and the Leſſor of the Plaintiff, were the Teſtator's Nephews; and that he deviſed the reſidue of his Eſtates, both real and perſonal, equally between his ſaid two Nephews.

THAT GEORGE GREW had no child at the time of making the Will: that he entered on the Premiſes, ſuffered a Recovery thereof, and died without iſſue male.

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On this Caſe a Verdict was given for the Plaintiff, ſubject to the Opinion of the Court upon this Queſtion, viz.

WHETHER GEORGE GREW took an Eſtate Tail, or for Life only, under the ſaid Will?

Lord Chief Juſtice WILMOT.

I think this is an Eſtate Tail. The general Rule is a clear and a juſt one, that the Intention of the Teſtator is to be collected from the whole Will, and ſuch a Conſtruction made as will effectuate that Intention, provided that intention does not contradict, or claſh with, any legal principles or poſitive Rules of Law: for though the Statute of Wills gives a power to Parties to deviſe at their will and pleaſure, yet that will and pleaſure are bounded and circumſcribed, and muſt not paſs the Line which the Law has laid down for the modification of real Property upon principles of general Utility: they cannot create Perpetuities; they cannot lock up Property for a longer time than a Life or Lives in being, and twenty-one years afterwards, in the Caſe of Infants; they cannot give a Fee, and ſay it ſhall deſcend to all the Sons, or to Daughters excluſive of Sons; they cannot reſtrain a Tenant-in-Tail from ſuffering a common Recovery; and therefore in theſe, and all ſimilar Caſes, the Law, which is the Will of the whole Community, muſt controul the Will of Individuals. But this Caſe is not affected by any Intention croſſing the Law, for it is equally lawful to give the one Eſtate as the other; the word Iſſue has no fixed technical meaning annexed to it; and the only true Queſtion in this Caſe is, What was the Intention of the

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Teſtator, and whether that may be beſt effectuated by giving an Eſtate for Life or in Tail?

It is ſtated in the Caſe, that GEORGE GREW died without Iſſue male; but that event will not vary the Conſtruction of the Will, which muſt be conſidered exactly in the ſame manner as if he had, or might have had, many Sons; and looking at the Deviſe, in that view, of there being many Sons, will have a moſt powerful Influence upon the Expoſition of it, when the Intention comes to be nicely and critically examined: for though the Teſtator certainly intended, in the firſt inſtance, to give GEORGE GREW only an Eſtate for Life; yet if he, as certainly, intended that all his Sons ſhould take in ſucceſſion one after another, and they cannot take in that manner but by lodging the Eſtate Tail in GEORGE GREW, then it comes to this Caſe: here are two things intended, one an Eſtate for Life to G. GREW, another an Eſtate in ſucceſſion to all his Sons in Tail male "ad infinitum:" Can they both take place? If they can, they ought; if they cannot, then balance the two Intentions againſt one another, and ſee which is the weightieſt and moſt comprehenſive, and give that an effect. Courts ſubſtitute themſelves in the place of a Teſtator; and ſuppoſe the Queſtion to have been aſked him—"You have willed "two things, which cannot both be obeyed exactly according to your "Will, and therefore one muſt yield to the other:" What muſt have been the Anſwer? "I wiſh to be obliged in the principal, capital, and "moſt material deſtination I have made, and to reject the ſecondary "and ſubordinate one."

There are three points to be conſidered:

1ſt.—If he intended a ſucceſſive Inheritance to all the Iſſue male of GEORGE GREW, "ad infinitum," in preference to G. DODSON?

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2dly.—Whether that Intention can take place, if GEORGE GREW has only an Eſtate for Life?

3dly.—If it cannot, then which of the two Intentions muſt govern the Conſtruction? That is, if the words "for life" muſt give place, or the words expreſſing an Intention of giving "a ſucceſſive Inheri-"tance" to the Iſſue male of G. GREW?

As to the 1ſt. Point.—The Will is clear: Teſtator had two Nephews, G. GREW and G. DODSON; he gave particular Eſtates to each; this Eſtate he gave in Settlement;—others to DODSON in Fee;—the reſidue of his real and perſonal Eſtate equally between them. They were both equally objects of his favour and bounty, except that he gave GREW's Eſtate with Remainder to DODSON; his Name poſſibly produced that difference in the limitations; but it was not to take place whilſt any Iſſue male of G. GREW exiſted; a general failure of that Line is to open the Succeſſion to DODSON, and therefore a conſtruction to let him in ſooner would directly encounter the manifeſt Intention of the Teſtator, who was making each of his Nephews the diſtinct Root of ſucceſſion to particular parts of his Eſtate.

It was objected, that the word is only deſcriptive of an Individual, and the words "of the body of ſuch iſſue male" are in the ſingular number. Iſſue, in its natural, ordinary ſignification, means "all;" it may be reſtrained. If firſt, next, or any other ſimilar words had been uſed, he might have confined its general meaning; but as it ſtands in the Will, it comprehends "all." The word "Body" in the ſingular number, was not meant to point out one Individual, viz. the firſt Iſſue, and to exclude all the reſt; but to limit the operation of the Deviſe to one at a time in a courſe of ſucceſſion, and to exclude the Iſſue from taking all together, which might have been more doubtful,

ful, if the word had been in the plural number, "Bodies:" but without expreſs words, the Court will not make an expoſition productive of ſuch abſurd conſequences. If only one ſon, it muſt be the firſt; the exiſtence of a ſon for a moment determines the limitation; and if ten more ſons had been born after, they cannot take, but the Remainder limited to G. Dodson is to fall into poſſeſſion, in direct oppoſition to the Will, which ſays it ſhall take place for want of "ſuch Iſſue male"—*ſuch*; What? Iſſue male of the body of G. Grew; compriſing and embracing every branch ariſing from him; not one, but all the male Line derived from him.

It was alſo objected, that "Iſſue" is more properly a word of Purchaſe.—It is uſed in the "Statute de Donis" without an idea of Purchaſe annexed to it, and it acts in a double capacity, as will beſt anſwer the Intention; and though it was ſubſtituted in the place of the word "heirs," which was ſcratched out; and it was fairly argued he might intend it as a word of Purchaſe, yet it does not carry the Argument a jot further than the words "for life" do; for if they take by Purchaſe, they muſt all take as Joint Tenants for Life and Tenants in Common of Inheritance: Could that be his Intention? For if he had ten ſons and nine leave Iſſue, the tenth muſt have the whole Eſtate by Survivorſhip; and when all are dead, then the Eſtate muſt break into ten parts, and there can be no Croſs-Remainders; ſo that when there was a failure of Iſſue of one ſon, that part muſt go over to Dodson, when no part was intended to him whilſt there was any Iſſue male of the body of G. Grew.—He intended all to take, but in a courſe of ſucceſſion.

2dly.—Can this Intention take place, if G. Grew takes only an Eſtate for Life?

It

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It may, by conſtruing the word "Iſſue" to mean, firſt and every other Son in Succeſſion. Suppoſe he had ſaid, I mean by Iſſue, firſt and every other Son, it muſt have been ſo expounded, becauſe words are only pictures of ideas upon paper; and therefore if he puts a meaning on the word himſelf, it muſt be underſtood as he meant it: But he has not ſaid ſo, and therefore he leaves the word to act in its own natural character, and in that ſhape it will not endure to be expounded, "firſt and every other ſon in ſucceſſion;" for, "ex vi termini," it means "all," and hath not an eye of ſucceſſive priority in it; and there is no Caſe where it ever was conſtrued to mean firſt and every other Son in Succeſſion, and to create a ſeries of contingent Remainders one after another; which it muſt do, or the principal Intention of the Teſtator be diſappointed; and when it is deſcriptive of the Eſtate and operates as a word of Limitation, and gives an Eſtate Tail, it is not the "word," but the "Law," which regulates the Deſcent to all the Sons ſucceſſively, upon its own favourite principle of Primogeniture. It has been argued, that if we can collect from the Will that he meant firſt and every other Son in Succeſſion, why not conſtrue it ſo, and thereby complete every part of the Intention? Becauſe it would be doing violence to the word "Iſſue," and forcing it out of its known eſtabliſhed ſenſe, when the meaning of the Teſtator may be as effectually complied with by giving it one of its natural energies, as a word of limitation: and though the Intention, collected from the Will, is to govern the Conſtruction, yet there muſt be words uſed which are proper and fit for that purpoſe. It would confound the uſe of all language, and introduce the greateſt barbarity and confuſion, to make words ſtand for ideas in oppoſition to the ſenſe which Uſage has put upon them: and as a word of Limitation

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mitation it does not defeat the Eſtate for Life; for without Fine or Recovery, which is not to be preſumed, an Eſtate Tail is only an Eſtate for Life.

As to whether the words, "heirs male of the body of A." operating as words of Purchaſe, will have the ſame effect, and take in all the Iſſue male of A. as effectually as if they operated as words of Limitation; I do admit, upon the authority of Co. Lit. and the Caſe of Southcote and Stowell, 1 Mod. 226, 237, and Freeman's Reports, 216, 225, that when the Eſtate once veſts in an heir male of the body of A. by Purchaſe, that any other heir male of the body of A. may take by Deſcent; and the reaſon ſeems to be, becauſe it is "quaſi" an Eſtate Tail from A; and the Will of the Donor gives it a deſcendible quality, after it is once veſted, as to all the lineal male deſcendants from A. as well as to all the lineal male deſcendants of the firſt Purchaſer.

But ſtill it will not have the ſame conſequence as if they acted as words of limitation; for ſuppoſe A. has a ſon who dies in his father's lifetime leaving daughters, and A. has other ſons, they can never take at all, for the ſecond brother cannot take becauſe he is not complete heir; whereas if it was an Eſtate Tail in A. it would deſcend upon the ſecond ſon and take in all the deſcendants: and it is impoſſible to make it equivalent to a Limitation to the firſt and every other ſon, without violating and confounding the legal operation of words, and producing conſequences not warranted by the Will: for upon a Limitation to the firſt and every other ſon, the Remainders all veſt the inſtant the ſons are born; and when a ſon is of age, he may, by a Fine, bar all his iſſue: but where the Limitation is "to the heir male of the body of A." no Eſtate veſts till A. dies; and if there are

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no Truſtees to preſerve, &c. A. may bar the Remainders at any time after the ſons are born, as well as before; and a Fine levied by his eldeſt ſon will not bar his iſſue if he dies before the father, becauſe the iſſue will take by Purchaſe, and not from his father.

3dly.—Which Intention ought to take place *(a)*?

If the Teſtator had put the Iſſue and Remainder-men into the power of G. GREW, it is not to be preſumed he would defeat them. If he had given Contingent Remainders to the Iſſue, and they were to take by Purchaſe, he might defeat the Iſſue before they were born. —If Eſtate Tail, a chance—If confined to one Iſſue only, the reſt had no chance;—better to have a chance of ſomething—the Remainder was of no eſtimation after Eſtate Tail, veſted or contingent, "quâcunque viâ."

But ſuppoſe the Queſtion aſked, "You meant a ſtrict Settlement "with Truſtees to preſerve Contingent Remainders; but the words "will not warrant the expounding the Will in that manner. G. GREW "muſt either take an Eſtate Tail, which will let in all his Iſſue male, "but with a power of defeating them and GEORGE DODSON; or an "Eſtate for Life, which will let in G. DODSON, in excluſion of the "ſons of G. GREW?" His Anſwer muſt have been, "I do not in"tend G. DODSON any thing, whilſt there is Iſſue male of GEORGE "GREW."

It was certainly the Intention of the Teſtator that G. GREW's Sons ſhould take in ſucceſſion, which they could not do, if he was only

(a) The latter part of this Caſe is rather imperfect, and ſeems to contain only ſhort heads of Argument, which were probably filled up in the Delivery.

Tenant

Tenant for Life. I am of Opinion that he was Tenant in Tail, and that Judgment muſt be given for the Defendant.

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The other Judges delivering their Opinions to the ſame effect,

JUDGMENT for the DEFENDANT.

IN THE COMMON PLEAS.

Between JOHN DRINKWATER, Eſq; Plaintiff,

AGAINST

The ROYAL EXCHANGE ASSURANCE COMPANY, Defendants.

Mich. Term. 8 Geo. III. 1767. 2 Wilſon, 363. Drinkwater againſt the Royal Exchange Aſſurance Company.

THIS was an Action of Covenant brought againſt the Defendants on a Policy of Inſurance, in which the Plaintiff declared that by a certain Deed, commonly called a Policy of Inſurance, made by the aforeſaid ROYAL EXCHANGE ASSURANCE COMPANY, IT WAS WITNESSED, That the Capital Stock, &c. of the aforeſaid Corporation ſhould be ſubject and liable to pay, make good, and ſatisfy any Loſs or Damage which ſhould or might happen to a certain Malt Office by Fire, within the ſpace of twelve calendar months from the day of the date of that Inſtrument or Policy of Inſurance, not exceeding the ſum of £. 500: Provided always nevertheleſs, and it was thereby declared to be the true intent and meaning of that Deed or Policy, that the ſaid Stock Eſtate and Securities of the ſaid Corporation ſhould not be ſubject or liable to pay or make good to the Aſſured any Loſs or Damage by Fire which ſhould happen by any "Invaſion, Foreign Enemy, or any Military or Uſurped Power whatſoever:"

" ſoever:" Provided alſo, that that Deed or Policy ſhould not take place or be binding on the ſaid CORPORATION, if the ſaid Malt Office, at the time when any ſuch Fire ſhould happen, ſhould be in the Poſſeſſion of, or let to any perſon who ſhould uſe or exerciſe therein the Trade of a Sugar Baker, Apothecary, Chemiſt, Colourman, Diſtiller, Bread or Biſcuit Baker, Ship or Tallow Chandler, Stable-keeper or Inn-holder, or ſhould be made uſe of for the ſtowing or keeping of Hemp, Flax, Tallow, Pitch, Tar, or Turpentine; but that in all or any of the ſaid Caſes the ſaid Deed, and every Clauſe, Article, and Thing therein contained, ſhould ceaſe, determine, be utterly void, and of none effect. And Plaintiff further ſaith, that the ſaid Malt Office in the ſaid Deed mentioned, on the twenty-eighth of September, in the ſixth year aforeſaid, was burnt, conſumed, and totally deſtroyed by Fire, which did not happen by any " Invaſion, Foreign " Enemy, or any Military or Uſurped Power whatſoever;" and that the ſaid Malt Office, at the time when the ſaid Fire happened, was not in the Poſſeſſion of, or let to any Perſon who uſed or exerciſed therein the Trade of a Sugar Baker, &c.

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To which the Defendants pleaded, 1ſt, that they did not break the ſaid Covenants, nor any one of them, in manner and form as the ſaid Plaintiff hath above thereof complained againſt them, and Iſſue thereon. The Defendants, for further plea, ſay, that Plaintiff ought not to have or maintain his ſaid Action againſt them, becauſe they ſay, that whatever Loſs and Damage above ſuppoſed to have happened, by the burning and deſtroying the ſaid Malt Office by Fire, as Plaintiff hath above alleged, all ſuch Loſs and Damage was cauſed and did happen by means of an unlawful Attack and Invaſion made on the ſaid Malt Office by an Uſurped Power unlawfully exerciſed by a

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great number, that is to ſay, 300 perſons, unlawfully, riotouſly, and tumultuouſly aſſembled, in breach of the peace of our Lord the King, to the terror of the Inhabitants of the City of Norwich, and that the ſaid Fire above ſuppoſed did happen by ſuch Uſurped Power as aforeſaid, and this Defendants are ready to juſtify; wherefore they pray Judgment whether Plaintiff ought to have or maintain his Action as aforeſaid againſt them, &c.

Plaintiff, as to the 2d Plea above pleaded in bar, ſaith, that he, by reaſon of any thing in that Plea above alleged, ought not to be barred from having or maintaining his ſaid Action therefore againſt them, becauſe, Proteſting that the ſaid Plea, and the Matters therein mentioned, are altogether inſufficient in Law to bar or preclude the Plaintiff from having or maintaining his ſaid Action againſt the ſaid ROYAL EXCHANGE ASSURANCE COMPANY; nevertheleſs, for Replication Plaintiff ſaith, that the Loſs and Damage by the ſaid Malt Office being burnt, conſumed, and deſtroyed by Fire, in the ſaid Declaration mentioned, did not happen by any Uſurped Power whatſoever; and thereupon Iſſue is alſo joined; and on the Trial before the Right Honourable Sir JOHN EARDLEY WILMOT, Knight, Lord Chief Juſtice of his Majeſty's Court of Common Pleas at Weſtminſter, a Verdict was given for the Plaintiff, and £.469 Damages, ſubject to the Opinion of the Court of Common Pleas on the following Caſe; viz.

THAT the Defendants entered into the Policy as ſtated in the Declaration. That the Plaintiff paid the Premium, and complied with all the terms of the Policy on his part to be performed.

THAT on Saturday the 27th of September, 1766, a Mob aroſe in the City of Norwich, on account of the price of Proviſions, and did miſchief

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miſchief to one Houſe and a Mill, by throwing about and ſpoiling the Flour at a Baker's Houſe, and ſpoiling and damaging the Mill. That on the King's Proclamation being read, the Mob diſperſed and continued quiet. That about two of the Clock in the Afternoon of Sunday, the 28th of the ſame September, another Mob aroſe on the ſame account, and began to pull down, and afterwards ſet fire to and burned down the Malthouſe in queſtion; and afterwards forcibly and riotouſly damaged the Houſes of two Bakers, and ſpoiled their Furniture; that the ſaid Mob had no offenſive weapons on their going to the ſaid Malthouſe; but on their Return therefrom, ten or twelve of them had ſticks in their hands, and one of them had a Spit, bent double.

That, after the Mob had damaged the laſt of the ſaid Bakers Houſes, the Magiſtrates, who had not received any Notice or Information of any Mob being riſen on that day until after the ſaid Malthouſe was on fire, immediately, on receiving ſuch Notice thereof, aſſembled, with their Aſſiſtants, to the number of thirty, and thereupon oppoſed and knocked down ſeveral of the Mob, and in fifteen minutes diſperſed the whole of the Mob, and the Mob never afterwards aſſembled any more: That the Royal Exchange Assurance Company was created in the year 1720.

That the Company had, at the time of the ſaid Fire happening, made Aſſurances in the City of Norwich, on Houſes and Goods, to the amount of £.300,000, but had not any Fire Engine there, nor any Fire Men reſident there; but that there were ſeveral Fire Engines kept in the ſaid City of Norwich.

That it is uſual in Policies of Aſſurance in the Sun Fire Office to inſert, over and above and beſides the words of Exception contained

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in the preſent Policy, the additional words of "civil commotion" alſo.

The Queſtion therefore for the Opinion of the Court is:

Whether the Plaintiff, under the circumſtances of this Caſe, is entitled to recover in this Action?

This Caſe was twice argued at the Bar, and, after time taken to conſider of it, Mr. Juſtice GOULD was of Opinion that the Malthouſe, being burnt by a Mob, which roſe to reduce the price of Proviſions, it was burnt by an Uſurped Power, within the true Intent and Meaning of the Proviſo in the Policy. He cited Popham, 122, and was of Opinion that Judgment ought to be given for the Defendants.

Lord Chief Juſtice WILMOT, Mr. Juſtice CLIVE, and Mr. Juſtice BATHURST, were of a different Opinion.

Lord Chief Juſtice WILMOT.

I am of Opinion that the firing of the Malthouſe by the Mob, as deſcribed in this Caſe, is not a firing by the Uſurped Power meant in the Proviſo.

Policies of Inſurance, like all other Deeds and Inſtruments, which evidence the Agreements of Men with one another, muſt be conſtrued according to the true Intent and meaning of the Parties who make them; and though my brother LEE ſays they ſhould be conſtrued liberally, and my brother BURLAND ſays they ſhould be conſtrued ſtrictly, againſt the Inſurer, who is the Speaker in this Proviſo; yet I know of no other Rule, but to collect the Intention from the whole Inſtrument taken together, and to effectuate it; and the utmoſt

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to be inferred from the Rule is, that the turn of the Scale, in a doubtful Caſe, ſhould be againſt the Speaker; becauſe he ought to have expreſſed himſelf with more perſpicuity. To find out this Intention is often very difficult; for when Agreements are committed to writing, all extrinſic Evidence of Intention is ſhut out; and words being the only marks of that Intention, it frequently happens, that ſometimes from the imperfection and poverty of Language, and ſometimes from the barbarous and inaccurate application of it, it is extremely doubtful and obſcure what are the Ideas which the Parties denote by the words they employ to expreſs them. Where they paint ſimple and determinate Ideas with preciſion and certainty, the features of the Mind are as viſible as the features of the Body are in a picture: but the misfortune is, that words often paint very complex Ideas as diſtinct, ſimple ones; and then the eye of the mind is embarraſſed in the purſuit of that particular Idea they are meant to delineate; and the words "Uſurped Power" are two of thoſe equivocal words which perplex this Queſtion; and in all Caſes of this kind, Courts of Juſtice have no other clue to lead them out of the maze, but to conſider the import of the accompanying words, to take the general ſcope and deſign, as well as the particular ſentence in which thoſe words are found, into Conſideration together: the Context muſt be carefully and accurately examined, and, above all things, the popular and ordinary Uſe of the words, in reſpect of the ſubject about which they are uſed, muſt be attended to.

Uſage is one of the great maſter-keys which unlocks the meaning of words,

Quem penes arbitrium eſt et jus et norma loquendi:

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The words in the body of this Policy clearly take in all Fires, let them ariſe from what cauſe they will; and therefore unleſs the Fire by the Mob, deſcribed as in this Caſe, is taken out of the general words by the Proviſo, the Plaintiff's right to recover muſt be admitted.

The words of the Proviſo are, "Fires which ſhould happen by an "Invaſion, Foreign Enemy, or any Military or Uſurped Power what-"ſoever."

It was firſt argued that the word "Invaſion," and eſpecially connected with the word "whatſoever," might mean any unlawful Attack; but this was given up on the laſt Argument, and very rightly; for every wilful felonious burning would have been included in ſuch a Conſtruction, and all the intermediate words would have been rendered inſignificant and uſeleſs; whereas they were plainly inſerted to deſcribe ſome wilful Fires in oppoſition to others. If they do not except all Caſes, when Houſes are fired wilfully, what are the Caſes they do except?

The Caſes of Fires happening in the time of "Invaſions from abroad, and Rebellions at home," are when the King's Government is externally or internally attacked, and Armies are employed to defend and ſupport the Government eſtabliſhed by Law, or to ſubvert it, and eſtabliſh and ſupport a Government uſurped contrary to Law. Theſe words are deſcriptive of Convulſions which ſhake the whole Nation to its foundations, and menace a diſſolution of that ſyſtem of Government under which we live;—when the Laws lie dormant and inactive, and the functions of Magiſtracy are in a ſtate of ſuſpenſe, and firing Houſes and Towns is known to be a neceſſary and unavoidable conſequence, from friends as well as foes. Theſe are the outlines of the Picture

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which theſe words draw on my eye upon the firſt reading of them, and the more I have looked upon them, the deeper the impreſſion is upon my mind; and the time when this COMPANY was created, and which muſt be the time when theſe Policies were firſt framed, is very material, viz. 1720, only a few years after an Uſurpation of Regal Power both in Scotland and England, and juſt at the dawn of another Rebellion ready to break out; and though the virtues of the Royal Family have totally extinguiſhed every diſloyal ſentiment in this Kingdom now, yet it was not ſo romantic a Caution at that time, to guard againſt Fires happening from Rebels as well as from Enemies.

As the Time furniſhes a ſtrong preſumption, that a general Uſurpation of Sovereign Power by the Pretender was then in contemplation, and was what the COMPANY meant by theſe words; ſo the Time furniſhes a powerful Argument to me that rebellious Mobs were not intended to be included in them.

It is truly ſaid by the Defendants Counſel, that this was not many years after the Riot Act; that rebellious Mobs had been, and were, very frequent, and were not likely to decreaſe, from the ill humour which the year 1720 muſt have occaſioned: and can it be ſuppoſed that they would deſcend to ſuch minute Proviſions as they have made about Trades, particular kinds of Commodities carried in and kept in this Malthouſe, and at the ſame time leave Mobs and Inſurrections to be ſignified by words which muſt be ſtrained, and wrenched out of their popular meaning, to reach them, when the word "Mobs" would have completely ſpoken their Intention?

It has been ſaid, becauſe they had happened, and were more likely to happen than Rebellions, therefore they muſt intend to compriſe

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them in theſe words; but I feel the weight of that Argument the other way: If this had been the more material object to attend to, they would have explicitly mentioned it.

But to come a little nearer to the words, and to a more critical examination of them. "Invaſion and Foreign Enemy" manifeſtly relate to an external Attack; and as Pirates are ſaid to be "Hoſtes "humani generis," they may fall under the deſcription of Foreign Enemies. But the general meaning of the words is a hoſtile Attack upon the Nation.

"Military and Uſurped Power" are the next words. The word "Power" has a variety of ſignifications: it would be pedantic affectation to enumerate them; but in this place it can only mean Force, or Authority to uſe and apply Force; and the words which accompany it, muſt aſcertain the nature and kind of Authority.

The word "Power," in conjunction with "Military," may mean to include "Fires from Soldiers;" from that claſs, rank, degree, and order, which is known and diſtinguiſhed in all States by the name of "Military Power," in oppoſition to "Civil Power."

But the material word upon which this queſtion turns is the word "Uſurped:" it certainly does not mean ſimply "uſed," for though ſometimes "Uſurped," in Latin, has that import; yet, in Engliſh, it always carries the Idea along with it, of uſing that which another perſon has a right to uſe, and that is a frequent ſignification of the word in Latin; and indeed, in its legal, as well as its popular, ſignification, it deſcribes the unlawful aſſuming the exerciſe of a Right belonging to another, as, the Uſurpation of an Advowſon, uſurping Franchiſes. Mr. Lock defines Uſurpation, getting into poſſeſſion of that which another has a right to, viz. a change of Perſons and

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not of Forms and Rules of Government; and in common parlance it marks a rebellious aſſumption of illegal Authority.

The Context ſhews that the executive Power of Foreign States, the Legal executive Power, and the Uſurped executive Power of our own State, were the Powers the Company had in their eye. The Power uſurped muſt be a Power "ejuſdem generis" with the antecedent Powers pointed out in that Proviſo; and the reaſon of excepting Fires from one of thoſe Powers, might naturally lead them to extend the Proviſo to all of a ſimilar nature.

It has not been contended, that theſe words take in Fires ariſing from Individuals, acting upon private motives: if one, or fifty in conjunction, had ſet this Malthouſe on fire from any private pique or malice, it would be impoſſible to ſay the Fire had happened from an Uſurped Power, unleſs the Act done made an Uſurped Power, which is confounding two Ideas together, that muſt be carefully ſeparated in examining this Queſtion; for the Power from whence the Fire muſt ariſe in this Caſe, muſt not owe its exiſtence to the Act done, but muſt be exiſting, as an Uſurped Power, before the Act done; and therefore it is argued that here was a Power uſurped before the Houſe was fired; that is, a Power Uſurped to reduce the price of Proviſions; that this is a branch of Regal Power, and that it is not the totality of Regal Power which this Proviſo means.

There is no occaſion to give any Opinion upon Caſes where there is a general Inſurrection, or Mobs "more guerrino, arraiati cum vexillis "explicatis, cum armis defenſivis et offenſivis, cum tympanis et "tubis:" where Captains are appointed, and the form and order of War appear in the face of it, and where the avowed purpoſe of ſuch

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a Corps is to pull down "all" Bawdy Houſes, "all" Meeting Houſes, "all Encloſures," or to abate the price of Proviſions "every where;" for here it would clearly and indiſputably amount to a levying of war againſt the King, and be a conſtructive High Treaſon.

In ſuch a Caſe, I might have ſome doubt; though, according to the Idea which the word "Uſurped" raiſes in my mind, I could not call ſuch a Power an Uſurpation, but a Power illegally aſſumed to do what no Power could lawfully do; for I ſee no Power in the King to reduce the price of Proviſions; and if there is no ſuch "Regal" Power, there can be no ſuch "Uſurped" Power, which I conſider as a Power oppoſed to and ſtanding in the place of a Power "de jure:" and though this doctrine of conſtructive High Treaſon in the Caſes in Popham, 122. 2 Anderſon, 4. Kelyng, 70. and many other Caſes which have ſince happened, are determined upon very wiſe and ſalutary principles, we are here conſtruing and expounding the words of a private Contract; and therefore the Queſtion is not, what will turn a Riot into a Rebellion, in legal Conſideration, but what the Parties mean by the words "Uſurped Power," when Invaſions and Armies and Soldiers are in their Contemplation, and the ſubject matter of the Proviſo, where thoſe words are found? and though the Law is fully ſettled upon that point, yet none but Lawyers, who had dipped into the Caſes of conſtructive High Treaſon, could have thought this a Caſe of levying of War againſt the King, which carries, in the popular ſignification, a War to dethrone and attain the totality of his Government; and we ſhould be very ſorry, in a Queſtion of private property, to pronounce people guilty of Conſtructive Treaſon, before Government had proſecuted them, and it appeared judicially, by the Record, that they had been guilty of it.

But

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But however the Law may ſtand upon a clear Caſe of conſtructive High Treaſon, or Rebellious Mob, yet this is a common Mob; and I know no difference between one Mob and another, except it be a Rebellious Mob, which, as deſcribed in the Caſes, would amount to a levying War againſt the King; and in ſuch a Caſe it might be more doubtful, becauſe it would have "ſpeciem belli," which is the Idea excited in my mind by the words "Uſurped Power," and which is to act within the meaning of this Proviſo.

But here the Mob roſe, Saturday, the 26th of September, 1766, on account of the price of Proviſions, and threw the Flour about a Baker's Houſe and damaged a Mill. Did they uſe any reſiſtance, and refuſe to obey the Law? The very reverſe: the Proclamation was read, and they diſperſed; there is not an eye of Rebellion in this; they hear the Law and obey it. The next day, another Mob aroſe on the ſame account: they began to pull down and fired the Malthouſe, and damaged the Houſes of two Bakers; they had no offenſive weapons when they went to the Malthouſe; thirty people diſperſed them in fifteen minutes, and they never aſſembled more.

As this Mob does not agree in any ſingle circumſtance with the outward and viſible form of a Rebellious Mob, as deſcribed in the Caſes, ſo it wants the eſſential Property neceſſary to conſtitute a Rebellious Mob, viz. a univerſality of purpoſe reſpecting the whole Kingdom, "to pull down Bawdy Houſes in general, to break open Priſons in general, to pull down all Encloſures;" 1 Hale's Pleas of the Crown, p. 135: for, if it was directed to particular Inſtances, as, not to make a general Abatement of the prices of Victuals or Corn, but in ſome particular Market, or within ſome Precinct, it was not a Rebellious Mob;

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Mob; by which I mean a Mob under ſuch circumſtances as would amount to a levying War againſt the King, that is, againſt his Office and Government.

They roſe on account of the price of Proviſions, and fell upon a Baker and Miller the firſt day, and upon a Maltſter and two Bakers the ſecond day. The utmoſt that I can collect from theſe facts is, that they thought the price of Proviſions was owing to the Perſons who followed thoſe Occupations, and therefore chaſtiſed and puniſhed them: for here is no ſetting a price, or forcing them to ſell at a rate they thought a proper one. The Facts ſtated evidence Anger, Reſentment, and Indignation againſt particular Trades, and it ſeems to have been a ſudden ſwell of their Paſſions, tranſporting them into a Felony, but I ſee no marks of Treaſon in it, as deſcribed by the Caſes; there was no previous Concert for that purpoſe, not the leaſt avowal or manifeſtation of a deſign to make any general Abatement of the price of Proviſions all over the Kingdom, or any where except Norwich. Suppoſing the deſtruction of Proviſions to be a mode of abating the price of Proviſions, and that by puniſhing theſe Millers, Bakers, and Maltſters, they hoped and meant to abate the price of Proviſions at Norwich; yet it wants univerſality of purpoſe, which is the diſtinguiſhing feature of a Rebellious Mob, and it wants that "ſpeciem belli," which Lord Hale lays ſo much ſtreſs upon in his deſcribing and defining ſuch a Rebellious Mob as would make the Actors in it Traitors.

But it is ſaid, Fires from Mobs are more likely to happen than Fires from regular Armies, either acting for or againſt the State; and therefore that we ſhould give theſe words a liberal, enlarged con-

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ſtruction; and that it is a hard Caſe to make the Defendants anſwer for a Loſs ariſing from a "vis major," not to be prevented by any Caution, and that, if doubtful, the ſcale ſhould turn in their favour.

The firing of Houſes by Mobs does not often happen. Conflagration affects Friends and Enemies alike; and therefore pulling down Houſes, when Mobs go beyond breaking of windows, is the common mode of expreſſing their reſentment; but War knows no diſtinction between Friends and Foes; and firing Houſes and Towns indiſcriminately are the unavoidable conſequences of it.

In my Opinion there is a prodigious difference between Mobs and Armies. The Laws, executed with ſpirit, will always ſuppreſs a Mob: the Magiſtrates did it with eaſe in this Caſe. The undaunted courage of an individual, or the perſonal appearance of a Man of Credit and Reputation, diſperſes or aſſuages theſe Fevers of the People: experience, as well as hiſtory, ſhews it, according to that beautiful ſimile in Virgil:

> Ac, veluti magno in populo quum ſæpe coorta eſt
> Seditio, ſævitque animis ignobile vulgus;
> Iamque faces et ſaxa volant; furor arma miniſtrat:
> Tum, pietate gravem ac meritis ſi forte virum quem
> Conſpexere, ſilent—arrectiſque auribus adſtant:
> Ille regit dictis animos et pectora mulcet.

But ſuppoſe a Mob fired a houſe before they diſperſed, all hands are inſtantly employed to extinguiſh it; but againſt Armies, neither the courage, nor character of individuals, can ſilence the thunder of cannon, or prevent the burſting of bombs; the inhabitants think of nothing

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nothing but ſaving their own lives, and inſtead of the activity of Firemen to check Fire, Soldiers become Firemen to ſpread it: the probability of its ſpreading in one Caſe bears no degree of proportion to the probability of its ſpreading in the other; the danger is not ſo great, and the reſiſtance much more eaſy; the reaſon for guarding againſt the one does not apply ſo powerfully as againſt the other.

As to the hardſhip of the Caſe, it is clear there are Caſes of equal hardſhip, which are more likely to happen, and do more frequently happen, and yet cannot poſſibly be reached by theſe words; viz. the "felonious" firing by one or more, or by any Mob, if it is not a Rebellious one. A year ſeldom paſſes without our trying people for ſuch Firings.

If the Law has not thought proper to provide againſt Caſes equally hard, and twenty times more frequent, why ſhould we extend it to a rare Caſe, when it is admitted to be ineffectual to reach a frequent one? As to the Caſes of Carriers, Gaolers, and Leſſees, they do not influence this Caſe; but becauſe the Law, for wiſe reaſons, makes them anſwerable againſt inevitable accidents, it does not follow from thence that a perſon muſt be anſwerable againſt ſuch accidents, upon a private Contract, unleſs it is conceived in ſuch Terms as manifeſtly indicate an Agreement to be anſwerable for them.

The general words of the Policy clearly manifeſt ſuch an Agreement in all ſuch Caſes, not excepted by the Proviſo; and I cannot think it a ſound conſtruction of theſe words to extend them, upon account of the hardſhip, to a very unuſual Caſe, and, at the ſame time, leave the common and ordinary Caſes, of equal hardſhip, totally unrelieved by them.

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The words of the Plea are, " unlawfully, riotouſly, and tumultu- " ouſly aſſembled," which ſhew they had not the leaſt apprehenſion of any thing more than of a common Mob.

I am of opinion therefore that there muſt be Judgment for the Plaintiff.

And accordingly, there being three Judges againſt one, the POSTEA was delivered to the

PLAINTIFF.

IN THE HOUSE OF LORDS.

APPEAL FROM THE COURT OF CHANCERY IN IRELAND.

RICHARD KEILEY, Eſq; Executor of JOHN KEILEY, Eſq; deceaſed, and HENRY SNOW and SHAPLAND CAREW, Eſqrs; and the Rev. HANS THOMAS FELL, Executors of ROBERT SNOW, Eſq; deceaſed . . . . . } APPELLANTS.

AGAINST

JOHN FOWLER, Son and Heir at Law and Adminiſtrator of RICHARD FOWLER, deceaſed, and Nephew and Executor of WILLIAM FOWLER, deceaſed . . . . . } RESPONDENT.

1ſt February, 1768. Keiley againſt Fowler. V. Brown's Caſes in Parliament, Vol. 6. 309.

SIR JOHN OSBORNE, Bart. being ſeiſed (amongſt other Lands and Hereditaments) of the Towns and Lands of Sleady and Ballykerrins in the County of Waterford in Ireland, in conſideration of £.60 paid him by William Cronyn, by Leaſe dated December 2, 1719, demiſed the ſame to ſaid William Cronyn, To hold from 1ſt May, then laſt, for nine hundred and ninety-nine years, ſubject to the Payment of the yearly Rent of £.100 ſterling, and to a Quit Rent of £.16. 8s. per annum.

William Cronyn, being in poſſeſſion of the Premiſes under this Leaſe, made his Will, dated July 15, 1726, and thereby deviſed (inter alia) in the following words, " I do leave and bequeath to my " Daughter, Jane Cronyn, all my worldly Subſtance, Lands, Stock,

" Corn, Debts, and Houſehold Goods, provided ſhe marries by the " Conſent of my Executors hereinafter mentioned, ſubject notwith- " ſtanding to my Debts and Legacies: but in caſe my ſaid Daughter " ſhould marry without the Conſent of my Executors, ſhe is to have " for ever only twenty Cows and a Horſe, as for her whole Fortune. " I do hereby appoint my very good Friend Arthur Uſher, in the " County of Waterford, Eſquire, and William Wigmore, of Cappo- " quin, in the ſaid County, Clerk, ſole Executors of this my laſt " Will and Teſtament, revoking and renouncing all former Wills. " Furthermore I do appoint that, in caſe my ſaid Daughter ſhould " die without Iſſue, that all my Subſtance, as before mentioned, ſhall " return back to my Executors, to be diſtributed and diſpoſed of " as I ſhall hereafter direct; and that my Daughter's Huſband ſhall " at leaſt be worth £.1,500 ſterling."—The Teſtator then goes on, giving various ſpecific and pecuniary Bequeſts to his Wife, his Relations (the Fowlers) and ſeveral of his Friends, and to his Executors; and then cloſes his Will with the following Clauſe, " And laſtly, in " caſe my forementioned Daughter, Jane Cronyn, ſhall marry with- " out Conſent of my Executors aforeſaid, or ſhall die without Iſſue, " I do ordain and appoint that all the Goods, Chattels, Lands, and " other my worldly Subſtance, to her before bequeathed, ſhall return " to my Executors, to be by them diſtributed in manner following, " to wit: to my Nephew, James Donagon, £.100; to Heſter Gambon, " £.50 ſterling; and to each of my Executors aforeſaid, £.50; to " my ſaid Daughter twenty Cows and a Horſe only, as before in this " Caſe bequeathed; and the Remainder to be equally divided among " the Children of my Siſter, Elinor Fowler."

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William Cronyn died ſoon after, and on the 6th May, 1727, his Executors proved the Will, and acted in the Truſts thereof, and poſſeſſed themſelves of his Eſtate and Effects, and received the Rents and Profits of the ſaid leaſed Lands, Jane being, at her Father's death, an Infant.

By Marriage Articles, dated the 10th February, 1731, in conſideration of a Marriage intended to be had between Stephen Sowton and Jane Cronyn, with the Conſent of the Executors, it was agreed (inter alia) that the ſaid Term of nine hundred and ninety-nine years, in the Lands of Sleady and Ballykerrins, ſhould be aſſigned to Truſtees, in Truſt to pay the Debts of the Teſtator, William Cronyn; and that the ſaid Stephen Sowton ſhould afterwards receive the Rents and Profits of the Premiſes, during the joint lives of himſelf and his intended Wife, Jane: and the Marriage was ſoon after ſolemnized.

Andrew Hill, William Cronyn's Brother-in-Law, in the year 1719, mortgaged a Leaſehold Eſtate, called Salterbridge and Aſſane, to Hugh Henry, Eſquire, in Truſt for Thomas Stepney, Eſquire, for ſecuring £.500 and Intereſt; and William Cronyn and Francis Duggan joined with Hill, in executing a Bond and Warrant of Attorney to confeſs Judgment to Hugh Henry, as a collateral ſecurity for the ſame. Thomas Stepney dying, Hugh Henry, by deed, declared the Truſt of the £.500, and aſſigned the Mortgage and Bond, and a Judgment entered up thereon by virtue of the ſaid Warrant of Attorney, unto Charles Stepney, the ſurviving Executor of Thomas Stepney; and Charles Stepney, about October, 1732, iſſued a "fieri facias," in the County of Waterford, to levy upon the Goods of the ſaid Andrew Hill,

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Hill, £.609. 5s. 4d. The Sheriff's Officer, in colluſion with Sowton and Hill, ſeized and ſold by private Sale, to Sowton, the Leaſe of the Eſtate, ſo mortgaged to Henry, in Truſt for Stepney, for £.128 only; and Sowton immediately took poſſeſſion of the mortgaged Premiſes, and kept the ſame for ſix years and upwards, and during all that time received the Rents and Profits thereof to his own uſe. But Sowton finding himſelf obliged to pay the reſidue of the £.500 due to Stepney, notwithſtanding the fraudulent Purchaſe obtained as aforeſaid, he applied to John Fell and Nathaniel France to lend him £.600, and by Indenture of Mortgage, dated Nov. 11, 1763, (to which William Cronyn's Executors were made Parties, but refuſed to execute,) Sowton conveyed not only the ſaid Leaſehold Premiſes of Salterbridge and Affane, but alſo the Lands of Sleady and Ballykerrins, for the remainder of the reſpective Terms therein; and for better ſecuring the repayment of the ſaid £.600 and Intereſt to Fell and France, he executed a Bond and Warrant of Attorney to confeſs Judgment thereon.

Stepney, on the 28th of December, 1736, aſſigned his Mortgage to Sowton, who by Indenture, dated 29th January, 1738, ſold the reſidue of the Term of Salterbridge and Affane to Matthew Hales for £.730, but did not apply any part thereof to pay off the £.600 Mortgage to Fell and France; whereupon Fell and France filed their Bill of Foreclоſure, in the Court of Exchequer in Ireland, againſt Sowton and Hales, and on the 13th May, 1741, the Cauſe was heard, and the Court decreed a Foreclоſure and Sale of Salterbridge and Affane, but refuſed to make any decree touching the Lands of Sleady and Ballykerrins.

Robert

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Robert Snow, attorney to Fell and France, finding himſelf diſappointed by this Decree in his deſign of obtaining the Lands of Sleady and Ballykerrins, in combination with Sowton and Hales, in October, 1742, by virtue of the Judgment, entered upon the Bond given by Sowton to Fell and France, ſeized the ſaid Lands; and the Sheriff, by the procurement of Snow, in conſideration of £. 800, ſold the ſame to him for the reſidue of ſuch Term as Sowton had therein, in Truſt as to one Moiety for John Keiley, and as to the other Moiety for himſelf.

Jane Sowton died on the 19th October, 1743, without ever having had any Iſſue, whereupon William Fowler and Richard Fowler, two of the Children of Elinor Fowler, Siſter of the Teſtator, William Cronyn, became entitled, together with the other Children of the ſaid Elinor, to the Leaſe of Sleady and Ballykerrins; and in April, 1747, they filed their original Bill in the Court of Chancery in Ireland, againſt the Appellant, RICHARD KEILEY, the ſaid Robert Snow, and ſeveral others, ſtating the Leaſe, and the ſeveral matters aforeſaid, and that Snow and John Keiley, to the time of his death, and the Appellant, RICHARD KEILEY, his Executor, had ever ſince the Sale made by the Sheriff, under Fell and France's Execution, been in poſſeſſion, and received the Rents and Profits of the ſaid Lands of Sleady and Ballykerrins, amounting to the yearly ſum of £. 180 ſterling, above the reſerved Rents thereof. The Bill therefore prayed an Account of Cronyn's Eſtate and Effects againſt Uſher and Wigmore, his Executors, and that Snow and KEILEY might be decreed to deliver up the Leaſe of the ſaid Lands to them, and the other Children of Elinor Fowler, and might account for the Rents and Profits thereof from the death of Jane Cronyn.

Arthur

Arthur Uſher, one of the Executors of William Cronyn, by his Anſwer admitted the Will, and that the Teſtator died poſſeſſed of the ſaid Lands of Sleady and Ballykerrins, and a conſiderable perſonal Eſtate. That the Reſpondent, and his Brothers and Siſter, named in the Bill, were the Children of Elinor Fowler, the Teſtator's Siſter, and that Probate of the Will was granted to him and Wigmore, his Co-executor. That they did not poſſeſs themſelves of any of the Teſtator's Goods and Chattels, but permitted Jane to take the ſame as they were bequeathed to her. That they, at Jane's requeſt, received the Rents and Profits for her Uſe, and accounted with Stephen Sowton, her Huſband, for the ſame. Believed that Sowton became poſſeſſed of the Lands, and, without the Defendant's conſent, mortgaged them to Fell and France for £. 600, and executed a Bond and Warrant of Attorney as a collateral ſecurity, who ſued out Execution thereon, and ſold the Lands to Snow in Truſt for himſelf, Snow, and KEILEY, as ſtated in the Bill. Believed that Jane died without Iſſue.

Richard Wigmore, by his Anſwer, admitted himſelf to be the ſurviving Executor of William Wigmore, the Co-executor with Arthur Uſher, and Adminiſtrator of his Affets to the value of £. 1000 and upwards.

Robert Snow, by his Anſwer, ſaid, he believed the Reſpondent, and his Brothers and Siſter, were the Children of Elinor, the Siſter of William Cronyn; and that William Cronyn was poſſeſſed of Sleady and Ballykerrins, under the ſaid Leaſe, for 999 years, at £. 100 yearly Rent. Admitted the Will of William Cronyn, and that the Executors proved the ſame. Believed Jane was the only Child of the Teſtator, and the Reſpondent and his Brothers and Siſter Nephews and

Niece

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Niece of the Teſtator. That Jane married Stephen Sowton, on 11th November, 1736, and that he made a Mortgage to Fell and France, and executed a Bond and Warrant of Attorney, whereon Judgment was entered, and "fieri facias" iſſued to the Sheriff, who ſeized the ſaid Leaſehold Premiſes of Sleady and Ballykerrins, and about the 1ſt November, 1742, ſold the ſame, and ſuch other Intereſt as Stephen Sowton had therein, to Snow for £.890, in Truſt, as to a Moiety thereof for John Keiley. Admitted that, before the ſaid Purchaſe, he knew of the Will of William Cronyn, and the Title of the ſaid Jane thereby; and that the ſaid Bond and Judgment were executed by Sowton as a collateral Security for the ſaid £.600, and that the Executors of William Cronyn were Parties to the Mortgage; but did not execute it. That Jane died in 1743, without Iſſue; but that he did not believe the Reſpondent and his Brothers and Siſters, by that means, or for that the Mortgage to Fell and France was made without Conſent, had therefore any right to an Account of William Cronyn's Aſſets. He admitted that he refuſed to give them poſſeſſion of the Lands, or to account with them for the Rents and Profits thereof. Said that Stephen Sowton, from his Marriage, until Snow bought the Lands, received the Rents and Profits thereof, and that the Rents had ever ſince been received by KEILEY. That all the Teſtator's Debts and Legacies were paid, except ſuch as depended on the Deviſe over, which he inſiſted was void; and that he paid the ſaid £.890; and computed the Lands to be of the clear yearly value of £.150 or thereabouts.

All the Defendants having anſwered, Iſſue was joined, and ſome Witneſſes were examined, on behalf of KEILEY and SNOW, to prove the

the Sheriff's Sale to Sowton, and that the Marriage of Jane was with Conſent. And an Order was made, on Conſent, that the Leaſe of the 2d December, 1719, ſhould be read on the Hearing, as proved.

The Cauſe came on to be heard before the Lord Chancellor of Ireland, on the 7th, 11th, and 17th of May, 1762, when his Lordſhip was pleaſed to Decree, that JOHN FOWLER, the Reſpondent, as Adminiſtrator of Richard Fowler, who was Executor of William Fowler, was entitled, under the Will of William Cronyn, to Two-ſixth parts of the Lands of Sleady and Ballykerrins, for the remainder of the ſaid Term of nine hundred and ninety-nine years, and to Two-ſixth parts of the clear Rents, Iſſues, and Profits thereof, from the death of Jane Sowton, otherwiſe Cronyn; ſubject nevertheleſs to the Debts and Legacies of William Cronyn remaining unpaid; and awarded an Injunction to put the Reſpondent into Poſſeſſion of the ſaid Two-ſixth parts; referred it to the Maſter to take an Account of the Rents, Iſſues, and Profits which Robert Snow and RICHARD KEILEY, and John Keiley, deceaſed, or any of them, had received, or, without wilful default, might have received, of the ſaid Lands ſince the death of Jane; and alſo to take an Account of the Debts and Legacies of William Cronyn remaining unpaid, and of the perſonal Eſtate he was entitled to at his death, and to enquire into whoſe hands the ſame came, and how diſpoſed of, with other uſual directions.

In purſuance of this Decree, various Proceedings were had before the Maſter, who, on the 14th of June, 1766, reported a Balance due to the Reſpondent for his Two-ſixth parts of the Rents and Profits of the Eſtate of £. 1,395, and that his ſhare of the unſatisfied Legacies amounted to £. 92. 18 *s.* 2 *d.*

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The Cauſe came on to be heard, for further Directions on the Maſter's Report, on the 5th February, 1767, when the Lord Chancellor was pleaſed to Decree, that the Reſpondent ſhould recover from the Appellants the £. 1,395 reported due to him, with Intereſt for the ſame; and further Decreed Two-ſixth of the Legacies, reported to remain unpaid, to be a Charge on Two-ſixth of the Lands decreed to the Reſpondent.

From theſe Decrees the preſent Appeal was brought.

After hearing Counſel on this Appeal, the following Queſtion was put to the Judges; viz. "When are the Bequeſts over, in caſe his "Daughter ſhould die without Iſſue, to take effect, according to the "true Intent and meaning of the Will of William Cronyn; whether "upon her death, and an indefinite failure of Iſſue at any time; or "upon her death without ever having had Iſſue; or upon her death "without Iſſue "living at that time;" or upon her death and failure "of Iſſue during the lives of the perſons to whom the Bequeſts are "made, or any of them?"

16th Feb. 1768.

The Judges having taken time to conſider, Sir JOHN EARDLEY WILMOT, Lord Chief Juſtice of the Court of Common Pleas, delivered their unanimous Opinion:

As this Queſtion is framed, it is not neceſſary to enter minutely into the hiſtory or reaſon of the Law in ſetting bounds to the diſpoſing Power of every ſpecies of property in this kingdom: it may be ſufficient to ſay, that the Law, from an indulgence to the natural wiſhes of men to perpetuate their property in their own families, or the

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the families they adopt, has given them a power of controul over it for one or more lives in being at the ſame time, and twenty-one years after in caſe of Infancy. But Public Convenience, ſound Conſtitutional Policy, and the ſpirit of Liberty, which breathes through every part of our Law, will not endure any ſpecies of property to be chained down any longer; and therefore, if the Teſtator meant, in this Caſe, to lock up his leaſehold and perſonal Eſtate beyond his daughter's life, and that this Bequeſt ſhould hang like a cloud, to burſt upon it, when there ſhould be a failure of her Iſſue "at any time after her death," his Intention was an illegal one, and muſt yield to the Law, and the Bequeſt will be void. If, on the contrary, he intended, that this Bequeſt over ſhould take place upon the event of his Daughter's dying without Iſſue, "living at the time of her death," then his Intention, being confined to a life in being, is agreeable to the rules of Law, and the Bequeſt over will be a good one; and therefore the Queſtion propoſed ſtrikes at the true point of this Caſe, When did the Teſtator intend this Bequeſt over ſhould take effect? For once fix that Intention, and the Law decides upon it without the leaſt ambiguity.

As the Law has been now ſettled about a Century, and univerſally known, it ought to appear clearly and explicitly, that the Teſtator meant an illegal Limitation. The proof of ſuch an Intention lies upon the Party, who aſſerts it. If that Intention does not appear, if there is the leaſt doubt about it; the preſumption would be, that he meant a Diſpoſition he was enabled to make by the rules of Law, and not a Diſpoſition condemned by the Law.

If the legal ſuppoſition is to prevail, that every man knows the Law, no man in his ſenſes could intend to do what he knew he

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could not do. And to ſee what he did intend, I will examine the Will; for the intent and meaning of the Will is the Queſtion.

William Cronyn, having a daughter and a ſiſter's children, being poſſeſſed of a leaſehold and perſonal Eſtate, but no freehold Eſtate, deviſes, inter alia, as follows:

Here he ſtated the Will.

No man, who reads this Will, could entertain a doubt, what the Teſtator meant by it, if it had reſted only upon the words "If my "daughter die without iſſue." I ſpeak now, and mean to be underſtood as ſpeaking, abſtractedly from all the Caſes and legal expoſition of theſe words; "if ſhe die without Iſſue," that is, if ſhe has no Iſſue at the time of her death, if ſhe leave no Iſſue at the time of her death; not, "if ſhe leave Iſſue, and that Iſſue fail two hundred "years hence." Whenever that Iſſue fails, the Daughter will then become dead without Iſſue, but ſhe did not die without Iſſue: for "dying" denotes that "punctum temporis," when the breath departs out of the body.

Such an expoſition of theſe words as is contended for, produces this monſtrous abſurdity: it makes dying "with Iſſue" and dying "with-"out Iſſue" to mean directly the ſame thing; they will have exactly the ſame operation; for if ſhe dies with Iſſue, the Bequeſt over is not to take place; and if ſhe dies without Iſſue, it is not to take place.

It is a ſhameful abuſe of language to ſay, that dying without Iſſue on this day, the 1ſt of February 1768, and being dead without Iſſue, upon the 1ſt of February 1900, mean one and the ſame thing. It is repealing that great Law of all language, the Grammar, and confounding preſent and future time together. It is the moſt intolerable tyranny, the groſſeſt barbariſm, to ſay, they mark one idea; when the

the man who uſes them, and all who read and hear them, are convinced they mark another. Keiley againſt Fowler.

The Law preſumes men "inopes conſilii," when they make their Wills; they are often made in their laſt illneſs, upon death beds, when the ableſt underſtandings are impaired, and they cannot expreſs themſelves with that energy and propriety which they would have done in their healths; and therefore Courts make the words follow the Intention; enlarge, abridge, tranſpoſe, do any thing to reach the Intention, when they are ſure they ſee and know it.

But wreſting and torturing words out of their natural ſignification, to defeat a Teſtator's Intention, is directly counteracting the injunctions of the Law in expounding Wills, and racking a man upon his death bed, to make him ſay what he never meant or thought of; and therefore, independently of Caſes, theſe words alone "die without "Iſſue" would be ſufficient to denote the time, when theſe Bequeſts over were to take place.

But, unfortunately for Deviſees, claiming under bequeſts depending upon the contingency expreſſed in theſe words only, without any other words to reſtrict them, ſome of the greateſt and ableſt men have followed one another in ſaying, that, alone and by themſelves, they muſt be conſtrued to mean "being dead without iſſue at any future time," and that Limitations over upon them are void.

I cannot help ſhedding a tear upon the introduction of ſuch a ſoleciſm into the Law—But I will relate how it happened: it was owing to a fundamental miſtake originally, in transferring a Conſtruction which had been put upon theſe words, when applied to Eſtates of Inheritance, which might be entailed, to Leaſehold and Perſonal Eſtates which could not be entailed.

I will

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I will ſhortly ſtate the hiſtory of it: when Eſtates of Inheritance were deviſed to A.; and, if A. died without Iſſue, to B.; the Teſtator's Intention was clear, that B. was not to take whilſt there was any Iſſue of A. It was equally clear, that he intended the Iſſue of A. ſhould inherit his Eſtate. It was equally clear, that the Iſſue could take only by giving an Eſtate Tail to A. which would let in his Iſſue "ad infinitum;" and therefore, to effectuate that Intention, the Judges conſtrued theſe words, to give an Eſtate Tail "by implica-"tion," and to have the ſame effect, as if he had given the Eſtate "to A. and his Iſſue," which in a Will gives an Eſtate Tail; and no Perpetuity could be created by ſuch a conſtruction, becauſe the Eſtate Tail, and the Remainders over upon it, might always be barred by a Recovery. The words were thrown out of their natural ſignification to comply with the Intention.

Now examine theſe words, when applied to Leaſehold Eſtates, which cannot be entailed. Leaſehold Eſtates originally were of little eſtimation in the eye of the Law. In Edward the Sixth's time, all the Judges were of opinion, they would not bear any Limitation over at all. Then *(a)* ——— conſidered as good, ——— if uſe only ——— Deviſe to A. and if he died, living I. S. to him, —— void. Afterwards —— held to be good.

Then attempts were made to carry the Limitations of them further, and to entail them, and limit Remainders over upon them. But—No;——the Judges ſtopped here.—They ſaid, you ſhall not entail them, and limit Remainders over upon them. Firſt, you cannot entail them ſo as to make them tranſmiſſible in a courſe of ſucceſſion

(a) There are blanks in the MS. which were probably filled up in delivering the Opinion.

to

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to heirs: they muſt go to perſonal Repreſentatives; and therefore, if a Term is deviſed to a man and the heirs of his body, he ſhall take the whole Intereſt. For his Iſſue cannot take it; and if the Limitation over upon it was to be good, it would produce a Perpetuity. For no Recovery could be ſuffered of it, as there might of an Eſtate Tail of Inheritance.

Then come Caſes where Terms were given in the ſame words as would have given an Eſtate Tail by implication upon an Inheritance, that is, to A., and, if he died without Iſſue, to B. Having determined that theſe words would give an Eſtate Tail upon an Inheritance, the Judges gave them the ſame effect upon a Leaſehold Eſtate, and followed it with all the conſequences of an Eſtate Tail, in reſpect of the Limitations over. Whereas the very reaſons which induced the Judges to take the words out of their natural ſignification totally failed, when the words were applied to a Leaſehold Eſtate. For the Iſſue could not take a Leaſehold Eſtate in a courſe of ſucceſſion, as they might take an Eſtate of Inheritance; and the danger of a Perpetuity was avoided by leaving the words to operate in their natural ſignification, which would tie up the Contingency to one life in being.

Having forced the words out of their natural ſignification to effectuate the Intention, they ſhould have reſtored them to their natural ſignification again, when they found it would not effectuate the Intention, but entirely defeat it. Thus from giving theſe words the ſame operation, when applied to Leaſehold Eſtates as to Eſtates of Inheritance, hath ariſen this technical Rule, "that the words, if die without Iſſue, ſhall mean being dead without Iſſue at the remoteſt period of time;" and conſequently,

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conſequently, that a Limitation over upon ſo remote a Contingency is void.

Lord Nottingham echoes this Rule over and over again in the Duke of Norfolk's Caſe *(a)*. Lord Macclesfield, Lord King, Lord Talbot, and Lord Hardwicke have followed one another in ſaying the ſame thing; and we do not mean to ſhake that Rule, becauſe "ſtare deciſis" is a firſt principle in the Adminiſtration of Juſtice, and this not from any fear of bringing Appeals or Writs of Error in particular Caſes: Time guards them.—But becauſe theſe Caſes have furniſhed the light, by which Conveyancers have been directed in ſettling and transferring Property from one man to another. Upon the faith of an eſtabliſhed Rule and the acquieſcence of Judges, and of the whole Nation in it, Property to the amount of Millions may depend. The Judges now (as their Predeceſſors have always done) bow down to the Rule "pro "ſalute populi," which is the ſupreme Law of every Community. But this Rule doth ſo revolt againſt the human underſtanding, that all the Chancellors, who have agreed to the Rule, at the ſame time have ſaid, that, if there are any words, paſſages, or expreſſions, in a Will, to ſhew that the Teſtator did not mean to uſe the words in the "legal" but in the "vulgar" ſenſe; that Intention manifeſted, ſhould repel the preſumption of their being uſed in their "artificial and "technical" ſenſe, and ſhall leave the words to re-aſſume their natural ſhape, and act in their proper character.

(a) Select Caſes in Chancery, 26.

1 Peere Williams, 199. Nicholls *v.* Hooper. Lord Harcourt ſays, "Where a Legacy is given by a Will upon this Contingency, ſcil. "if T. S. ſhall die without Iſſue, this ſhall be taken according to com- "mon parlance, viz. Iſſue living at his death; and it cannot be in-

"tended

" tended, that the Teſtator deſigned, that whenever there was a " failure of Iſſue of THOMAS, which might be 100 years hence, that " then theſe Legacies, which were meant only as perſonal Proviſions, " ſhould take effect." Keiley againſt Fowler.

I will only mention a few caſes: Penbury and Elkin, 2 Vernon, 758—766. and 1 P. Williams, 563. (ſee the Caſe.) Parker, Chancellor, admitted the Rule, but controuled it by converting five Letters into two. He conſtrued " after" to mean " at;" and yet " after" denotes an indefinite time, and " at" a definite one; but as the legal import of the words, " if die without Iſſue," had unhinged the Intention, he thought it very right and juſtifiable to hinge it again, by forcing " after" out of its place, and conſtruing it " at."

The Caſe of Target and Gaunt, 1 P. Williams, 432. Lord Parker ſaid, " to ſuch of the Iſſue as he ſhould appoint," muſt be intended Iſſue then living, becauſe it was to ſuch Iſſue to whom HENRY might appoint it.

Pleydell and Pleydell, 1 P. Williams, 748. Iſſue was there held to mean Sons, as Lord Hardwicke declared in Sheppard and Leſſingham, 29th and 30th October 1751. Ambler, 122. Forth and Chapman, by Lord Parker, 1 P. Williams, 663. A ray of his great genius irradiated that Caſe, and he gave the ſame words different conſtructions to reach the Intention.

Exell and Wallace, 22 June 1751. Lord Hardwicke ſaid, " the " ſame words may have different operations, according to the dif- " ferent kinds of Eſtates intended to be limited; and the Caſes of " Forth and Chapman, and Lord Glenorchy and Boſville, are ex- " preſs Authorities as to this point." 2 Vez. 120. 318. and MS. note.

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Maddox and Staines, 2 P. Williams, 421. Lord King. There, Iſſue was conſtrued to mean Children, Sons and Daughters.—Atkinſon and Hutchiſon, 3 P. Williams, 258. Lord Talbot. "Without leaving Iſſue," that is, at the time of his death.—Beauclerk and Dormer. Heard at Powis Houſe, 17th June 1742. 2 Atk. 308. Lord Hardwicke adopts the legal ſignification of theſe words ſtanding by themſelves; but puts the Queſtion, Whether there is any particular circumſtance in the Caſe, that can confine the words to Miſs Dormer's dying without Iſſue, at the time of her death?

(He then ſtated the Clauſes, and the reaſoning upon them.)

Lord Hardwicke admits the principle, but found no ſuch words. In Sheppard againſt Leffingham, Lord Hardwicke ſays, "Dying without Iſſue generally is too remote, as in Miſs Dormer's Caſe, but "here muſt mean, leaving Iſſue living at the time of his death."

What do all theſe Caſes prove? That they have admitted the Rule; that they have ſhut their eyes, as we do, upon the vulgar ſenſe of the words, "if die without Iſſue," and ſwallowed the legal ſenſe, bitter as it is: this was done to avoid confuſion, and diſturbing perſonal Property enjoyed under the ſanction of it; but, at the ſame time, they have catched at any word or expreſſion, which might bring the Caſe out of the Rule.

They have remembered what Lord Hobart, (277.) recommends to Judges, "to be curious, and almoſt ſubtle, "aſtuti," (which is the "word uſed in the Proverbs of Solomon, in a good ſenſe, when it is "to a good end) to invent reaſons and means to make Acts according "to the juſt intent of the Parties, and to avoid wrong and injury, "which by rigid Rules might be wrought out of the Act."

Implication

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Implication is only preſumed Intention, and Preſumption only ſtands till the contrary appears; and therefore, if other parts of the Will repel that Preſumption, it loſes all its power of directing the conſtruction of the Senſe.

I will now bring the Caſe to its true point. What are the words in this Will, which ſhew the Teſtator meant a failure of Iſſue at the death of his Daughter, and not a failure of Iſſue at any future time after her death?

His Daughter, at the time of making his Will, was young. He gave her all: but two events aroſe in his mind; an improvident Marriage, and her death without Iſſue.

The firſt was checked by requiring the Executors Conſent. If ſhe marry without Conſent of Executors, ſhe is to have only twenty cows and a horſe. This was an event to happen in her life-time; and though it would be abſurd to refer the Words, as they ſtand in the laſt Clauſe, to her death, becauſe ſhe could not have the cows and horſe after ſhe was dead; yet it ſhews the confined extent of his mind at that time, and denotes that the other event in his contemplation was an event, "ejuſdem generis," viz. a definite event; and it would be making his imagination to take a prodigious leap from an event, which muſt happen in her life, to an event, which might not have taken place till the next millenium.

If ſhe had Iſſue when ſhe died, he might naturally leave it in her power to do as ſhe pleaſed with the property. It was moſt likely that her Iſſue would be benefited by it: but, if ſhe had no Iſſue, he might think himſelf as proper a perſon to diſpoſe of it to a ſtranger as ſhe was.

The ſenſe, which theſe two Proviſions, taken together, moſt manifeſtly bear, is this: "My Daughter ſhall have nothing abſolutely but

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twenty cows and a horſe, unleſs ſhe marries with the Conſent of my Executors, and leaves Iſſue." Whereas, if the Bequeſt over is void, ſhe will have the whole perſonal Eſtate for ever, though ſhe leaves no Iſſue at all.

The next Words we rely upon are, that in the event of his Daughter's death without Iſſue, his whole Subſtance ſhall "return back" to his Executors, to be "diſtributed" and diſpoſed of as he directed. Return back? when, and to whom? When his Daughter dies, and to his very good friend Uſhart, and to Wigmore, his Executors? No—It is ſaid, Executors muſt mean their perſonal Repreſentatives, when there is a failure of her Iſſue at any time; and that they were intended, that is, the Office was intended, to make the Diſtribution, and not the Executors named in the Will. We are now upon Evidence of Intention; not what would be the legal conſequence of ſuch a Power, if it could be carried through all the mazy tracks of a legal Repreſentation at a diſtance; but whether he extended his ideas beyond his two Friends Uſhart and Wigmore, to whom he gives Legacies, in the event of his Daughter enjoying his whole eſtate; and an additional Legacy of fifty Pounds a piece, when either of the events happened, on which they were to have the additional trouble of making a Diſtribution.

All was tied up in his mind to Uſhart and Wigmore perſonally, from the good opinion he had of their judgment and integrity to diſtribute equally. One great Truſt was repoſed in them, inſeparable, unalienable, and intranſmiſſible, and that was, their Conſent to his Daughter's Marriage. He makes no diſtinction between the Executors, who were to exerciſe their judgment upon his Daughter's marriage, and the Executors to whom the Eſtate was to return back, and whom he entruſted

entruſted to diſtribute, and to whom he gave the Legacy of fifty Pounds a piece for their additional trouble. He meant the ſame perſons: he carried his ideas no further than his Daughter, and Uſhart and Wigmore.

The Law confines one of the Truſts to Uſhart and Wigmore perſonally. The Teſtator clearly meant the ſame perſons in "toto." That Legacy will not follow the perſonal Repreſentatives of the Teſtator; for if tranſmiſſible, the perſonal Repreſentatives of each Executor would be entitled: whereas the Executors of the Executor, who dies firſt, cannot repreſent the Teſtator; and the adminiſtrator of the ſurviving Executor does not repreſent him. The Repreſentatives of the Teſtator are not entitled to the Legacy; for the Legacy was meant to thoſe who were to diſtribute, and that could only take place in Uſhart and Wigmore. If the Teſtator, therefore, appears clearly to have meant, that the Eſtate was to return to Uſhart and Wigmore, and that he intended they ſhould make the Diſtribution, and have the Legacies for it, then it excludes a poſſibility of an indefinite time, which might be five hundred years after they were dead.

But there is ſtill a further and moſt deciſive Evidence of Intention, ariſing from the perſons, amongſt whom the Eſtate is to be diſtributed, viz. the Children of his Siſter.

The Teſtator had a Daughter, and ſix Nephews and Nieces, the Children of his Siſter, Elinor Fowler. He ſays, "If my Daughter marries with Conſent, and leaves Iſſue, ſhe ſhall have all my Fortune; if not, I ſubſtitute the Children of my Siſter in her place," (taking three or four ſmall Legacies out of it.) Theſe muſt be conſidered as Portions and perſonal Proviſions for them.

There

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There are eſtabliſhed known diſtinctions between Legacies by and to Strangers, and by Parents, or perſons ſtanding in the place of Parents.

In the latter caſe, they are always conſidered as Portions and perſonal Proviſions; which furniſhes a ſtrong argument of perſonality, and it was ſo admitted by Lord Hardwicke, in Beauclerk and Dormer, 2 Atk. 311. "Something plauſible might be ſaid, if this was to be con-"ſtrued as merely perſonal to her:" but in that Caſe, not only Miſs Dormer, but Lord George and Lady Diana, were all ſtrangers to the Teſtator.

Nichols and Hooper, 1 P. Williams, 198. Lord Harcourt lays a ſtreſs upon their being perſonal Proviſions to Nieces. Suppoſe he had had a Son and five more Daughters, and had bequeathed in theſe words, "to his Son, and if he die without Iſſue, to be diſtributed amongſt his Daughters." Would it not have been "Intention apparent," that he meant a perſonal Proviſion for his Daughters? His Nephews and Nieces ſtood one degree further off; but, from their proximity, they were the natural objects of his favour, after his own Children.

A Diſtribution amongſt his Siſter's Children, two hundred years hence, is too abſurd and ridiculous to have entered into his head, or into the head of any man, who reads the Will: and though it has been rightly ſaid, there is a particular perſon named in every Bequeſt over; yet here, the relation of the Deviſees to the Teſtator denotes Portion and perſonal Proviſion, and a Diſtribution moſt likely to be made in their lives, if at all. And it differs from the common Caſe in another particular: the Teſtator ſeems to have meant Children living at the time of the Diſtribution.

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There are many Caſes upon the words "Children living," viz. ſome, when the Will is made: ſome, at the death of Teſtator: ſome, at the time when payable: ſome, at the time of Diſtribution: ſome take in Children born after, and ſuſpend the Diſtribution.

Every Caſe ſtands upon the Evidence of the Teſtator's Intention, ariſing out of each Will. In Queſtions of Intention, Caſes, unleſs they coincide in words, and every other circumſtance, never aſſiſt, but perplex the Expoſition.

A Will is the picture of a man's mind; and one may as well look at the picture of one man to know the perſon of another, as look at the Will of one mind to know the mind of another.

And ſuppoſe four of his Siſter's Children, born after the Teſtator's death, would have been entitled, if they had lived to a Diſtribution; but if they had died in their cradles, and only two had been living when Diſtribution was to be made, muſt the Father, as Adminiſtrator to them, have run away with four-fifths of the Eſtate, and the ſurviving Children have had only a ſixth part apiece? If the Teſtator had meant Repreſentatives, he would have ſaid ſo. He confined it to Children.

I will cite a Caſe, confining Diſtribution to Children living at the time of Diſtribution, and where the Children of Children, who had died in the mean time, were not ſuffered to partake. Crook and Brooking, 2 Vern. 50 and 106. (which he ſtated). But ſuppoſe the Adminiſtrators of Children, who died before the Diſtribution, would be entitled; yet how could the Teſtator have thought of ſuch a Diſtribution?

Every ſixth part might be broken into ſix hundred parts, and the adjuſting the proportions be impoſſible; or, if it could be done, the

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Legacies would be crumbled into ſuch minute morſels, as to be of ſervice to nobody. And, in this particular, it differs from almoſt all the Caſes, where the contingent Intereſt is limited to any ſingle individual; whereas the purſuit of the Repreſentative would not be accompanied with ſuch inſuperable difficulties. And there is ſomething very whimſical in making the tranſmiſſibility of ſuch a contingent Intereſt an Argument to prove that it can never veſt at all to be tranſmitted.

The ſmall Legacies of one hundred Pounds, and three fifties, are another Proof that he did not look at an indefinite failure of Iſſue. They muſt have been meant as perſonal Benefactions to the Legatees.

Every line and word of this Will ſhew, that the Teſtator's eye was upon a bounded proſpect; the diſobedience of his Daughter, or the death of his Daughter, marked the horizon all around him. His thoughts appear to have never ſtepped beyond it.

I am ſenſible that there is no difference between Deviſes of Leaſehold and other perſonal Chattels: but ſtill, when a man is talking of Stock and Corn, though perhaps not of itſelf a circumſtance to determine upon, yet, in conjunction with other circumſtances, it throws ſomething into the ſcale.

If I have laid a good foundation of Evidence to ſhew that the Teſtator meant the death of his Daughter, and not the failure of her Iſſue generally, when this Bequeſt was meant to take place; then we are warranted, by what Lord Hardwicke ſays in Beauclerk and Dormer, to call the natural ſignification and import of the words "if die "without iſſue" in aid of the other Paſſages, and as auxiliary to them; and this was my reaſon for troubling your Lordſhips at firſt with ſtating

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ſtating the true ſenſe and meaning of them, and to which I muſt beg leave to refer, not as legionary forces or principals, but as auxiliaries.

The truth is, theſe Words are condemned by the Law to be ſurly, rigid, inflexible, and immoveable, when they are alone; but, if they can but once be got into ſenſible company, they loſe their gloomy, dogmatical, arbitrary diſpoſition, and both ſpeak and act as the reſt of the company do: And combining all the words and paſſages in the Will, and the circumſtances I have mentioned, together, they form a body of Evidence, which carries reſiſtleſs conviction with them to our Underſtandings, that

" THE Bequeſts over, in caſe the Daughter of William Cronyn " ſhould die without Iſſue, are to take effect, according to the true " intent and meaning of his Will, upon the death of his Daughter " without Iſſue, living at that time."

WHEREUPON it was ORDERED and ADJUDGED, that the ſaid APPEAL be DISMISSED; and that the Orders and Decree therein complained of, be

AFFIRMED *(a)*.

(a) Vide Journals of the Houſe of Lords, Vol. 32. p. 60.

IN THE HOUSE OF LORDS.

Between JOHN WILKES, Esq; Plaintiff in Error,

AGAINST

The KING, Defendant in Error.

1768. Wilkes againſt The King. Brown's P. C. Vol. 6. p. 345.

In Michaelmas Term, 1763, Sir Fletcher Norton, Knight, his Majeſty's then Solicitor General, (the Office of Attorney General being vacant) filed an Information, "ex officio," in the Court of King's Bench, againſt the Plaintiff in Error; ſtating, that before the printing and publiſhing the ſeditious and ſcandalous Libel thereinafter mentioned, to wit, on the 19th April, in the third year of his preſent Majeſty's Reign, his Majesty did make and deliver a moſt gracious Speech from his Throne, to the purport and effect therein ſet forth; and that the ſaid John Wilkes moſt audaciouſly, wickedly, and ſeditiouſly deviſing, and intending to villify and traduce his Majesty, and his Government of this Realm, to impeach and diſparage his veracity and honour, and to repreſent, and cauſe it to be believed among his Majesty's Subjects, that his ſaid moſt gracious Speech contained Falſities and groſs Impoſitions upon the Public, and that his Majesty had ſuffered the honour of his Crown to be ſunk, debaſed, and proſtituted, and had given his Name as a ſanction to the moſt odious meaſures of Government; and alſo moſt wickedly, unlawfully, and

ſeditiouſly

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ſeditiouſly deviſing, intimating, and endeavouring, as far as in him, the ſaid JOHN WILKES, lay, to excite Diſobedience and Inſurrection amongſt the Subjects of this Realm, and to violate and diſturb the public tranquillity, good order, and peace of this Kingdom; after the making and delivery of the aforeſaid Speech, (that is to ſay) on the 2d day of Auguſt, in the ſaid third year of the Reign of our ſaid Lord the KING, unlawfully, wickedly, ſeditiouſly, and maliciouſly publiſhed, and cauſed to be printed and publiſhed, a certain malignant, ſeditious, and ſcandalous Book and Libel, intitled "The North Briton;" in one part whereof, intitled "No. 45, Saturday, April 23, 1763," were then and there contained (amongſt other things) divers malicious, ſeditious, and ſcandalous matters, to the effect in the Information ſet forth.

To this Information Mr. WILKES pleaded not guilty; and Sir Fletcher Norton, who had in the mean time been appointed to the Office of his Majeſty's Attorney General, joined Iſſue in that Character for his MAJESTY.

In the Sittings after Hilary Term, 1764, the Cauſe was tried by a Special Jury of the County of Middleſex; and Mr. WILKES was convicted of the Offences charged in the Information.

Before Judgment on this Conviction, Mr. WILKES abſconded, and went abroad, and Proceedings to Outlawry were had againſt him upon this Conviction; and on the 1ſt November, 1764, he was outlawed; but in Eaſter Term, 1768, he was apprehended, by virtue of a Writ of "Capias utlagatum," directed to the Sheriff of Middleſex, and being brought into the Court of King's Bench, was committed to the Cuſtody of the Marſhal of that Court.

In the ſame Term, Mr. WILKES obtained a Writ of Error upon the Outlawry; and having aſſigned Errors thereon, the ſame were

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argued in that and the following Term, and the Court of King's Bench reverſed the Outlawry for a defect of Form in the Return of the Sheriff to the Writ of "Exigent."

Mr. WILKES's Counſel, having ſurmiſed to the Court ſome Matters, which, if available, ought to have been moved in Arreſt of Judgment, and for a new Trial, the Court relaxed their general Rule, requiring ſuch Applications to be made within the firſt four days of the Term immediately following the Conviction, and indulged Mr. WILKES with leave to move then, as well in Arreſt of Judgment, as for a New Trial.

Accordingly it was argued by the Counſel for Mr. WILKES, that the Solicitor General was not the proper Officer, nor had any Authority to exhibit an Information; and that if he was veſted with ſuch Authority, it could only be temporary, during the vacancy of the Office of Attorney General; and it did not appear on the Proceedings, that the Office of Attorney General was at that time vacant; and on this ground it was moved that the Judgment ſhould be arreſted.

The Application for a new Trial was founded upon an Objection to an Order, made by the Lord Chief Juſtice of the Court of King's Bench, for amending the Information, after "Iſſue had been joined, and the Record of the Iſſue made up." But the Court unanimouſly over-ruled both the Objections, and took time to conſider of the Judgment upon the Conviction till the 17th June 1768, when Mr. WILKES, being brought into Court to receive Judgment, was ſentenced to pay a fine of £.500, and to be impriſoned ten calendar Months in the Cuſtody of the Marſhal.

There was another Information againſt Mr. WILKES, for publiſhing an obſcene and impious Libel, intitled an "Eſſay on Woman," which was filed in the ſame manner, and tried at the ſame time with the

the other; and upon this latter Information he was ſentenced to pay another Fine of £.500, and to be impriſoned for twelve calendar Months, to be computed from the Determination of the firſt Impriſonment. Wilkes againſt The King.

To reverſe theſe Judgments, Mr. WILKES brought two ſeveral Writs of Error in Parliament, and aſſigned the following Matters for Error: 1ſt. That it did not appear that Sir Fletcher Norton, by whom the Informations were exhibited, had any lawful Power, Warrant, or Authority to exhibit them, and therefore the Judgment was not ſufficient in Law to convict him. 2d. That he (Mr. WILKES) was ſentenced to be impriſoned for twelve Months, to commence at a future time; whereas ſuch Impriſonment ought to have commenced at and from the time of giving the Judgment, and not at any future time. 3d. That there was a variance between the Record and the original Information, the word "purport" having been altered to that of "tenor."

AFTER hearing Counſel on theſe Writs of Error, the following Queſtions were put to the Judges: 16th January, 1769.

1. "Whether an Information, filed by the King's Solicitor General, "during the vacancy of the office of the King's Attorney General, is "good in Law?"

2. "Whether in ſuch Caſe it is neceſſary, in point of Law, to aver "upon the Record, that the Attorney General's office was vacant?"

Upon the Second Record:

3. "Whether a Judgment of Impriſonment againſt a Defendant, "to commence from and after the Determination of an Impriſon-

"ment

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" ment to which he was before ſentenced for another Offence, is good " in Law?"

And Sir JOHN EARDLEY WILMOT, Lord Chief Juſtice of the Court of Common Pleas, having conferred with the reſt of the Judges preſent, acquainted the Houſe, " that they all agreed in Opinion;" and then his Lordſhip delivered their Reaſons.

AS to the firſt Queſtion:

Same Day.

We think this Information, ſo filed, is good in Law.

By our Conſtitution, the King is entruſted with the Proſecution of all Crimes which diſturb the Peace and Order of Society. He ſuſtains the Perſon of the whole Community, for the reſenting and puniſhing of all Offences which affect the Community; and for that reaſon, all Proceedings " ad Vindictam et Pœnam" are called in the Law, the Pleas or Suits of the Crown; and in Capital Crimes, theſe Suits of the Crown muſt be founded upon the Accuſation of a Grand Jury; but in all inferior Crimes, an Information by the King, or the Crown, directed by the King's Bench, is equivalent to the Accuſation of a Grand Jury, and the Proceedings upon it are as legally founded; this is ſolemnly ſettled and admitted. As Indictments and Informations, granted by the King's Bench, are the King's Suits, and under his controul; Informations, filed by his Attorney General, are moſt emphatically his Suits, becauſe they are the immediate emanations of his Will and Pleaſure. They are no more the Suits of the Attorney General than Indictments are the Suits of the Grand Jury.

Indictments and Informations are both the Voices of thoſe entruſted by the Conſtitution to awaken Criminal Juriſdiction, and to

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put it into motion. Who are thoſe perſons entruſted? A Grand Jury for all Crimes; the King's Bench, as well as a Grand Jury, for Miſdemeanors of magnitude.

An Information, brought by the Attorney General for a Miſdemeanor, is as much the Suit of the King, as Actions, brought by Attornies, are the Actions of their Clients, and not of the Attornies who bring them.

"The King ſues by his Attorney," or "the Attorney ſues for the "King," are only different forms of expreſſing the ſame thing. It is equally good either way, as appears by the Caſes in 2 Lev. 82. and 3 Keb. 127; and no legal Reaſon, but good manners and decency, as Lord Hale calls it, have given the preference of one Form to another. It is the King, who, by his Attorney, gives the Court to underſtand and be informed of the Fact complained of.

Before the Statute, 4 and 5 W. & M. c. 18. every private man might lay his Complaint before the Court as the King's Complainant;—this was abuſed, and was checked by the Statute; but it left all other Informations as they were. What were then the King's Informations? —His right, of "Informing" the Court, was not ſubjected to the check which the Act ſet upon the right of Individuals.

The Legiſlature truſted the King as the great Conſtitutional Guardian of the peace of the Society. The mere ſuggeſtion of an Individual was too ſlight; he was under no Oath. The King is under the moſt ſolemn Sanction in every part of his great Office; and it is wiſe not to controul it: he is not to be put on a level with the meaneſt of his ſubjects.

The arguing that the Attorney General only, and no other Officer, was entruſted by the Conſtitution to ſue for the King, either civilly or

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or criminally, is a fundamental miſtake. The Attorney General is entruſted by the King, and not by the Conſtitution; it is the King who is entruſted by the Conſtitution.

The great abilities of the Perſons appointed to this Office have made it figure high in the imagination, and annexed ideas to it which do not belong to it; for he is but an Attorney, though to the King, and in no other or different relation to him than every other Attorney is to his Employer; and it is by degrees that he hath attained to that Rank which he now holds in the Law.

I find no traces of ſuch an Officer for centuries after the Conqueſt; and that great Antiquarian, Spelman, under the word "Serviens ad "Legem," conſiders him, upon the authority of Paſſages cited out of Bracton, as the great Officer for Pleas of the Crown, and thinks the King had a Serjeant in every County for that Purpoſe; and in the Proclamations made even at this day, before any criminal Trial begins, the King's Serjeant is mentioned, even before the Attorney; and the 5th Edward III. c. 13, which gives an Averment againſt the Sheriff's Return of Impriſonment in Caſes of Outlawry at the King's Suit, mentions the King's Serjeant before the Attorney, and ſubjoins "or any that will ſue for the King;" which is a ſtrong indication that the King's Suits were not conſidered as then appropriated to his Attorney; and he had not then ſo much as the name of "Attorney "General," which means no more than the perſon generally employed to ſue and defend for the King, exactly in the ſame manner as the perſon generally employed by your Lordſhips, in your Suits, is called your Lordſhips Attorney, without putting the addition of "General" to it; and the Suits inſtituted by the King's Attorney, or by your Lordſhip's Attorney, are both inſtituted, either by ſpecial

and

and particular Directions, or under a general Authority, which is equivalent to a particular Direction for every particular Suit: and a Suit inſtituted by the Attorney General, is entitled the King and ——, and the Jury are ſworn between the King and ——, in the ſame manner as in Suits between private Individuals. Whether the King, when there is an Attorney or Solicitor General, might, by one of his Serjeants, or by his Solicitor, when there is an Attorney, now file either a Civil or Criminal Information, it is not neceſſary to determine; but the Paſſage, cited out of the Harleian Manuſcript, does not decide in the Negative; for the firſt part, in Henry the Eighth's time, orders the King's Solicitor to ſtop one Proſecution and commence another. The Office of Attorney General was either vacant or full at that time. If vacant, it proves the Solicitor ſtands in his place: if full, it proves that by particular Order, the King's Suit is not inſeparably attached to the Office of the King's Attorney.

The latter part of the Paſſage, containing the Reſolution of the 1ſt and 2d James I. is only the adjuſtment of a diſpute between the Attorney General and the King's Serjeant, whether the King's Serjeant could inſtitute a Suit ſo as to privilege it with reſpect to Fees, &c. in the ordinary courſe of Proceeding; and it was determined to belong to the Attorney General, in oppoſition to the Serjeant's Claim: but it does not follow from thence, that the King, if he had pleaſed, might not have empowered one of his own Serjeants to have commenced it: and a ſpecial antecedent Direction could not be neceſſary; for if the King afterwards avows the Suit, and purſues it, it is a Principle and Maxim that "omnis rati-habitio mandato æquiparatur;" but there is no occaſion in this Caſe to have any recourſe to ſuch a Ratification; for the Solicitor General is the "Secundarius

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Attornatus;" and as the Courts take notice judicially of the Attorney General, when there is one, they take notice of the Solicitor General, as ſtanding in his place, when there is none. He is a known and ſworn Officer of the Crown, as much as the Attorney; and, in the Vacancy of that Office, does every Act, and executes every Branch of it. But, whether it be the one or the other, they only echo the King's Complaint, and his Application to the Court to act upon it. When the Attorney dies or is removed, muſt the great Criminal Juriſdiction of this Kingdom, in his Department, be ſuſpended, till another is appointed? It is ſaid the King may appoint one. But it is a matter of great deliberation and infinite conſequence to have a perſon poſſeſſed of all the qualities neceſſary for that Office. Where is it to be found, that, in that interval, the nobleſt branch of the King's Regal Office becomes inactive, and the Subject's Right to Protection is in Abeyance? There is no ſuch abſurdity to be found in the Law; and an Hiatus in Government is ſo deteſted and abhorred, that the Law ſays, "the King never dies," that there may never be a "Ceſſer" of Regal Functions for a moment; but if this whimſical conceit were to take place, the death, or removal of the Attorney General, would ſuſpend one of thoſe Functions, though there was no Demiſe at all. That the Office of Attorney General devolves upon the Solicitor, is proved by ſuch a chain of Authorities, as can leave no doubt in any man's mind upon this Queſtion.

A courſe of Precedents and Judicial Proceedings in Courts of Juſtice, make the Law: it would be endleſs to cite Caſes upon it. A courſe of Practice for a few years has been held to controul an Act of Parliament. The Caſe of Bewdley Corporation, in the 12th Queen Anne, 1 P. Williams, 207. Before the 4th and 5th of Queen Anne,

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Juries were to come out of the Hundred of that place where the Action aroſe. This was attended with many inconveniences. That Law directed that the Jury ſhould come out of the Body of the County; but a Practice had prevailed in the Crown Office, to award the "Venire de Vicineto," as before the Act. It was referred to all the Judges. Their unanimous opinion was delivered by Parker, Chief Juſtice. The conſtant Practice and Precedents, both in the Crown Office and Exchequer, being "de Vicineto;" they eſtabliſhed the Practice, and ſaid, "to make a contrary Reſolution in this Caſe, would "be, in ſome meaſure, to overturn the Juſtice of the Nation for ſe-"veral years paſt." There was an interval of five or ſix years in that Caſe—but here there is near a Century.

The King and the Earl of Devon, Eaſter, 3 Ja. II. *(a)* Though the Information was filed by the Attorney General, it was taken up by the Solicitor General, and ſhews the ſame Powers. Proceedings were brought up into this Court, to found a Complaint upon; but there was no Writ of Error. The Judgment was never reverſed. There was not the leaſt Complaint. This Houſe acted upon it. This is a Recognition of his Authority.

(a) Middleſex. - - - Information filed by Sir Robert Sawyer, "Attorney General," againſt William Earl of Devon, ſtates, that he on the 24th April, 3 J. II. "vi & armis," at the City of Weſtminſter, in Middleſex, within the Palace of our Lord the King there, to wit, in Whitehall, (the King being then abiding in the ſaid Palace) one Thomas Colepepper, Eſquire, then and there in the Peace of God, and our ſaid Lord the King, did provoke and challenge to fight with him the ſaid William Earl of Devon, with intention to kill and murder him the ſaid Thomas, &c.

Plea. - - - And now (that is to ſay) on Friday, next after the Morrow of the Aſcenſion of our Lord, in this ſame Term, before our Lord the King at Weſtminſter, comes as well Sir Thomas Powis, Knight, "Solicitor General" of the ſaid King, who, for our ſaid Lord the King, now proſecutes in his proper perſon, as the ſaid William Earl of Devon, in his proper perſon; and the ſaid Earl ſays, &c.

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[Here the Chief Juſtice ſtated many Caſes in the Exchequer, Chancery, and King's Bench; and particularly, the Queen and Lawſon, Eaſter, 7th of Queen Anne, which was an Information exhibited in the Exchequer by Sir James Montague, "Solicitor General," and where the Judgment was affirmed by Lord Cooper, Holt and Treby.]

The Attorney General is no more a ſworn officer of the King's Bench than the Solicitor General.

As to the 2d Queſtion:

The inſerting the Vacancy of the Office of Attorney General in the Record ſometimes, and at other times omitting it, ſhews it was thought a matter of indifference. There are more Criminal Informations in the Exchequer, without thoſe words than with them. At moſt it could be only an Irregularity, which would not make the Information void; becauſe it is the King's Suit, and the Court is well founded in opening their Juriſdiction upon it; all Irregularities muſt be challenged in time, and if not challenged, are waived; and the Pleading and going to Trial are clearly a Waiver, if there had been any weight at all in this Objection; but we think there is none. In this Caſe, the Information, though filed by the Solicitor, is brought into Court by the Attorney, who was the ſame perſon who filed it. By ſo doing, he has adopted it; and it is become his Information to every intent and purpoſe whatſoever.

When filed—Proceſs—when brought into Court—read over and charged with it. It is now done by the Officer—but it is for the Attorney. If there was any foundation—it ſhould have been objected to then. If not, it muſt be conſidered as waived.

On

On the 3d Queſtion:

We are of opinion that the Defendant, being convicted of two Offences, it was neceſſary that two Judgments ſhould be pronounced, one upon each Information.

Fine and Impriſonment, or other corporal Puniſhment, may be awarded for ſuch Offences as are contained in theſe Informations.

The Kind, and the Quantity, are left by the Law to the Diſcretion of the Court, which paſſes the Sentence; and that Diſcretion is regulated by the nature of the Offence, and the circumſtances which aggravate and extenuate it; by the ſtate and condition of the Delinquent, and the Impriſonment he has already ſuffered: and that Diſcretion is always exerciſed with that lenity and compaſſion which do ſo eminently diſtinguiſh the Adminiſtration of Criminal Juſtice in this Kingdom.

That ſound Diſcretion led the Court to Fine and Impriſonment, as the proper and adequate Puniſhment for theſe Offences. A very large Fine might have amounted to perpetual Impriſonment: a very ſmall Fine muſt neceſſarily have produced a prolongation of the Impriſonment. By mixing them together, the keen edge of each is taken off, and the conſequence of a large Fine, or a very long Impriſonment, carefully avoided.

A Fine of £. 500, and ten months Impriſonment, is the Puniſhment for the treaſonable Libel; a Fine of £. 500, and twelve months Impriſonment, to commence from the Determination of the former Impriſonment, is the Puniſhment for the blaſphemous Libel. The Objection is, that the Sentence for the blaſphemous Libel is erroneous, becauſe the Puniſhment is not to take place till another Puniſhment is ended, either by effluxion of Time or other ſooner Determination of it; which may be by a Reverſal of that Judgment, or the

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the King's Pardon; and that all Judgments are to take immediate effect, and not to commence "in futuro." In general, the language of all Judgments for Offences, reſpects the time of giving the Judgment; though the Puniſhment, directed to be inflicted, is in no Caſe inflicted immediately; and in many Caſes, the Judgment directs the Puniſhment to be "in futuro," and muſt be ſo according to the nature of the Puniſhment.

In Petit Larceny—to be whipt three Market Days ſucceſſively—to ſet a man in the Pillory three times, at a week's or a month's diſtance—to find Security for good Behaviour from the end of a certain Impriſonment, or an uncertain one, as thoſe Impriſonments are, where a Fine is to be paid.

In Treaſons and Felonies—a certain known Judgment, which cannot be departed from, viz. in the preſent Tenſe of the ſubjunctive Paſſive: but in Miſdemeanors, where Puniſhment is diſcretionary, the Limitation, as to Time, ſeems only to be, that the Puniſhment ſhall take place before a total diſmiſſion of the Party: a Puniſhment ſhall not hang over a man's head when he has been once diſcharged; that is properly a Puniſhment "in futuro." But whilſt he remains under a ſtate of Puniſhment, whilſt he is ſuffering one part of his Puniſhment, he is very properly the object of a different kind of Puniſhment to take place during the continuance of the former, or immediately after the end of it. And every Caſe of this kind muſt depend upon the peculiar circumſtances which attend it.

In this Caſe, it muſt be aſſumed, that Fine and Impriſonment were the proper kind of Puniſhment to be inflicted for theſe Offences; becauſe the Court, intruſted by the Conſtitution with deciding upon the Puniſhment, has ſaid ſo. The Facts and Circumſtances which guided their Judgment, in that reſpect, are not before your Lord-

ſhips. They hear a Report of the Trial, and Affidavits of every Fact which aggravates or alleviates the Offence; and therefore your Lordſhips muſt now proceed upon a ſuppoſition, that Fine and Impriſonment were the adequate Puniſhments to be inflicted for each Offence. You will be diſpoſed to ſay and to think ſo, becauſe they are the mildeſt and gentleſt Puniſhments.

The Puniſhment might have been inflicted different ways.

1ſt. By Impriſonment for twelve months; but as he was already ſentenced to ten months, it would have been only an Impriſonment for two.

2d. By Impriſonment for twenty-two months; which would, in effect, have been for twelve.

But this would have been moſt groſsly unjuſt, becauſe if the firſt Judgment ſhould be reverſed, or he had been pardoned, he would have been impriſoned twenty-two months, when the Court only intended an Impriſonment of twelve.

3d. The Court might have laid a Fine of £. 1,000, with a ſhort Impriſonment for one Offence; and a ſmall Fine, with an Impriſonment for twenty-two months for the other.

This would have been equally unjuſt—for the Offences are different, and have no relation to one another. The Proſecutions are diſtinct, and the Records as ſeparate from one another as if there had been two ſeparate Delinquents; and the Offences on each Record, muſt be as ſeparately and diſtinctly eſtimated; and though Judgment happened to be paſſed at the ſame Time for both Offences, yet the Rule of admeaſuring muſt be the ſame as if the Judgment had been pronounced at different times.

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The Puniſhment muſt be proportioned to the ſpecific Offence contained in the Record, upon which the Judgment is then to be pronounced; and muſt be neither longer nor ſhorter, wider nor narrower, than that ſpecific Offence deſerves. The balance is to be held with a ſteady even hand; and the Crime and the Puniſhment are to counterpoiſe each other; and a Judgment given, or to be given againſt the ſame perſon for a diſtinct Offence, is not to be thrown into either ſcale, to add an atom to either.

To lay a Fine of £.1,000 for one Offence, and twenty-two months Impriſonment for the other, when the Court thought a Fine of £.500, and an Impriſonment of ten months, was the proper and adequate Puniſhment for one Offence, and a Fine of £.500, and an Impriſonment of twelve months for the other, would have been twiſting the two Offences and their Puniſhments together, and a departure from the firſt principle of diſtributive Juſtice, which commands all Judges to inflict that Puniſhment, and that Puniſhment only, which they think commenſurate to the ſpecific Crime before them; and it might have been productive of the ſame injuſtice I have already mentioned, viz. the Judgment in one might be reverſed or pardoned; and the Delinquent would then be ſubject to a larger Fine or a longer Impriſonment, than the Court intended to ſubject him to for one of the Offences only.

We cannot explore any mode of ſentencing a man to Impriſonment, who is impriſoned already, but by tacking one Impriſonment to the other, as is done in the preſent Caſe.

It is not letting the Judgment for the firſt Offence vary the Puniſhment, or influence the quantum of it in the other; but only providing,

ing, from the ſituation of the Delinquent, to effectuate the Puniſhment the Court thought his Crime deſerved. It is ſhaping the Judgment to the peculiar circumſtances of the Caſe; and the neceſſity of poſtponing the commencement of the Impriſonment, under the ſecond Judgment, ariſes from the Party's own guilt, which had ſubjected him to a preſent Impriſonment; and therefore the Queſtion really is, Whether a man, under a ſentence of Impriſonment for one Offence, can be ſentenced to be impriſoned again for another Offence? If he can, this is the only Form by which it can be done conſiſtent with Juſtice. If it cannot be done, then, in all Offences which are puniſhable only by Fine and Impriſonment, if a man has committed twenty, and has been ſentenced to Impriſonment for one of them, he muſt be fined for all the reſt, which will amount to perpetual Impriſonment with nine parts in ten of the people moſt likely to commit ſuch Offences: Or an Impriſonment muſt be directed for every Offence after the firſt, inadequate and diſproportionate to it.

For ſuppoſe twenty Offences of the ſame malignity, and meriting exactly the ſame Puniſhments—if ſix months Impriſonment were the puniſhment directed for the firſt Offence; the ſecond muſt be twelve months; and, proceeding progreſſively, the twentieth muſt be ten years: and thus ſix months and ten years will be the puniſhment for Offences which ought to have been puniſhed exactly alike. Or, if it be an Offence where Whipping or Pillory might be inflicted, the alternative of a moderate Impriſonment will not be in the power of the Court to inflict; but they will be under the neceſſity of laying a large Fine, or directing one of the other ſevere corporal Puniſhments.

In Dr. Bonham's Caſe, 8 Co. 107. The Charter granted by King Henry VIII. confirmed by an Act of 14 Hen. VIII. c. 5. gives the

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Cenſors of the College of Phyſicians a Power to puniſh Phyſicians for a mal and inſufficient Adminiſtration of Phyſic, by Amercement, Impriſonment, &c.

Dr. Bonham was convened, examined, and found inſufficient by the Cenſors. He was amerced £. 5, to be paid at their next Meeting; and "deinceps abſtineret, etc. quouſque Inventus fuerit ſufficiens "ſub pœna conjiciendi in carcerem, ſi in premiſſis delinqueret."

He perſevered to practiſe, and they ſummoned him again—He made default. The Cenſors ordered him to be arreſted, and afterwards he came before them, and being aſked to ſubmit to their Authority, he refuſed; and they committed him, and awarded that he ſhould continue in Gaol till they releaſed him.

It appears from this Caſe, 1ſt. That he was under no prior Sentence of Impriſonment, as here.

2dly. That after the Judgment of his Inſufficiency, he was diſmiſſed, with a threat of Impriſonment only; and was afterwards committed to Priſon for not ſubmitting to their Authority.

Whereas the Delinquent here was never diſmiſſed, nor out of Cuſtody, for a Moment.

3dly. It was a ſpecial Power and Authority of a very ſingular and deſpotic nature, committed to private perſons, and therefore to be executed ſtrictly; and when they are empowered to impriſon, if they find a perſon inſufficient, the Puniſhment muſt immediately follow the Judgment; becauſe, if ſuſpended a day, it might be ſuſpended a year. If totally diſmiſſed, and the Party is at liberty, the power over him is determined.

So in the Caſe of the 27th of Henry VII. Y. B. on the Statute of Weſtminſter 2d. 13 Edward I. c. 11.; if Bailiffs, &c. are found in

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Arrear, " arreſtentur corpora eorum, et per teſtimonium Auditorum " ejuſdem compoti, mittantur et liberentur proximæ Goalæ Domini " Regis in partibus illis."

No time was limited; they muſt commit immediately.—In that Caſe, it was contended on the Plea, that he had been at large; and then their Power over him was determined, and ſo that what they did after, was " tortious." It was a ſpecial Power and Authority, to be exerciſed ſtrictly; and therefore held that the Commitment muſt be to the next Gaol, whether in the County or not; and if falſe Impriſonment was brought againſt Auditors, they muſt ſhew that they purſued their Power. And the ſame anſwer applies to the other Caſes upon the Statutes of forcible Entries.

[He then cited various other Precedents, particularly the Caſe of The King and Dalton, 3 Geo. I. 1716, in which the firſt Judgment was given in July preceding, upon an Indictment for ſeditious Words againſt the King; and the Puniſhment was a Fine of twenty-five Marks and Commitment for one year, and to find Sureties for three years. There was a ſecond Conviction, in July, of a like Offence, and Judgment of a Fine of twenty-five Marks and Commitment " pro ſpacio unius anni integri poſt expirationem prior: Judic: Im- " priſonament: verſus eum nuper adjudicatum."]

IN Anſwer to the Queſtions therefore propoſed by your Lordſhips, our unanimous Opinion is:

1ſt. That an Information, filed by the King's Solicitor General, during the Vacancy of the Office of Attorney General, is good in Law.

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2dly. That in ſuch a Caſe, it is not neceſſary, in point of Law, to aver upon the Record that the Attorney General's Office was vacant.

3dly. That a Judgment of Impriſonment againſt a Defendant, to commence from and after the Determination of an Impriſonment to which he was before ſentenced for another Offence, is good in Law.

WHEREUPON it was ORDERED and ADJUDGED, that the Judgments of the Court of KING's BENCH be

AFFIRMED *(a)*.

(a) Vide Journals of the Houſe of Lords, Vol. 32. p. 222.

IN THE COMMON PLEAS.

GEORGE BALLY, Clerk, Rector of Monkton, Hants, Plaintiff,

AGAINST

JAMES WELLS, Assignee of JAMES WHITMARSH, Defendant.

Mich. 10 Geo. III. 1769. Bally against Wells. Vide 3 Wilson, 25.

THIS was an Action brought by GEORGE BALLY, Clerk, Rector of Monkton, in the County of Southampton, against JAMES WELLS, Assignee of James Whitmarsh, for the Breach of a Covenant contained in a Lease, made by the said GEORGE BALLY to James Whitmarsh, dated 15th Nov. 1766. By this Lease it was witnessed, that in Consideration of the Rent and Covenants on the part of J. Whitmarsh, his Executors, Administrators, and Assigns, the said GEORGE BALLY demised to him all the Tithes arising, &c. out of the Farms and Lands in the Parish of Monkton, from the 10th of October last past, for the term of six years, at the yearly rent of £. 96. 4s.

This Lease, besides other usual Covenants, contained the following; viz. "And the said James Whitmarsh, for himself, his Exe- "cutors, Administrators, and Assigns, doth thereby covenant and "agree, not to let any of the Farmers, now occupying the estate at "Monkton, have any part of the Tithes aforesaid, without the con- "sent of the said GEORGE BALLY, in writing, first had and ob- "tained."

It

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It contained alſo a Covenant from James Whitmarſh, his Executors, Adminiſtrators, and Aſſigns, to find and allow unto the ſaid GEORGE BALLY, ſufficient Wheat Straw for thatching of any of the Premiſes upon the Parſonage then in his Occupation.

In January, 1767, James Whitmarſh aſſigned his Intereſt in this Leaſe to the Defendant, JAMES WELLS, who, notwithſtanding the above Covenant, did let divers Farmers, occupiers, have part of the Tithes, without the Conſent of the ſaid G. BALLY, in writing, according to the Leaſe, and contrary to the Form and Effect of the Covenant of the ſaid James Whitmarſh and his Aſſigns.

To the Declaration, ſtating theſe Facts, the Defendant, JAMES WELLS, anſwered, that there is not any thing contained in the Declaration ſufficient to maintain the Action; and that he hath not occaſion, nor is he bound by the Law of this Realm, to anſwer; and for Plea in this behalf ſays, that he hath not broken the ſaid Covenant as complained of; and hereupon Iſſue was joined.

A Verdict being found for the Plaintiff, it was moved in Arreſt of Judgment, that an Action does not lie againſt the Aſſignee; for that it is a Covenant merely perſonal and collateral, binding the Leſſee only; alſo that Tithes are incorporeal, lying in Grant, and therefore that ſuch a Covenant cannot run with them.

Lord Chief Juſtice WILMOT delivered the Opinion of the Court:

An Objection in Arreſt of Judgment has been made, that the Covenant in the Leaſe, "not to let any of the Farmers of the Eſtate have any part of the Tithes without the Conſent of the Leſſor," is

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is a mere collateral, perſonal Covenant, confined in its Operation to the Leſſee himſelf, and that the Aſſignee of the Leſſee is not affected or bound by it: that Tithe is an incorporeal Inheritance lying in Grant, which will not endure ſuch an annexation of Covenant to it, as will paſs with the Tithe into the hands of an Aſſignee: But, upon Conſideration, we think the Action may be ſupported, and that the Intention of the Parties may have its full effect, without breaking in upon any adjudged Caſes, or ſhaking any of the Diſtinctions already eſtabliſhed.

The Intention of the Leſſor, in requiring this Covenant, was to prevent an Unity of Poſſeſſion of the Land and the Tithes; it was to keep them always in a ſtate of actual perception, and thereby to guard againſt all the Inconveniences which ariſe from the not receiving Tithes in the uſual and accuſtomed manner: and therefore this Covenant is really no more, than that the Leſſee and his Aſſigns ſhall take the Tithes in kind, that there may be a continuing, viſible, and notorious Evidence, not only of the right to the Tithes in kind, but of the manner of taking them; for though Tithes are due "commu-" ni jure;" yet temporary Compoſitions have laid the foundation of many Moduſes; and if there is any particular mode of Tithing, the Unity of Poſſeſſion in time wears out the traces of it; and therefore this Covenant was a Proviſion made for the maintaining and ſupporting the thing demiſed, and indeed for preſerving the very exiſtence of it.

There was another motive for compelling the Leſſee and his Aſſigns to take the Tithes in kind, which was to enable them to perform the Covenant of allowing ſufficient Wheat Straw for thatching any of the Premiſes upon the Parſonage. For though the Leſſee and his Aſſigns might procure the Straw elſewhere, and the Covenant is not ſo worded

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as to reſtrict the Delivery of the Straw ariſing from the Tithe; yet the Leſſor's eye was certainly upon the Tithe, as the natural Fund for ſerving the Parſonage; and this furniſhes an additional reaſon for connecting the Covenant with the Tithe to which it relates, and cementing them in ſuch a manner as to make them paſs together: and the Equity being clear, that the Aſſignee, who muſt have come in with full notice of this Covenant, ſhould ſtand in the place of the Aſſignor, and be bound by it. If the Equity and the Law can be mixed together, and made to flow in the ſame Channel, it muſt be the Inclination of every Court of Law to give a complete Relief, without ſending the Parties to another Court to obtain it at a great expence. If the Law be ſettled, we will not diſturb it.

To ſee whether the Equity of this Caſe can be got at in a Court of Law, I will conſider how the Law ſtands, in reſpect of Covenants following the thing demiſed into the hands of Aſſignees; and if there is any difference between Land and Tithes.

Spencer's Caſe, 5 Co. 16. ſtates all the diſtinctions very clearly. Covenants in Leaſes extending to a thing "in eſſe," parcel of the Demiſe, run with the Land, and bind the Aſſignee, though he be not named, as to repair, &c. And if they relate to a thing not "in eſſe," but yet the thing to be done is upon the Land demiſed, as to build a new Houſe or Wall; the Aſſignees, if named, are bound by the Covenants: but if they in no manner touch or concern the thing demiſed, as to build a Houſe on other Land, or to pay a collateral Sum to the Leſſor, the Aſſignee, though named, is not bound by ſuch Covenants: or if the Leaſe is of Sheep, or other perſonal Goods, the Aſſignee, though named, is not bound by any Covenant concerning them. The reaſons why the Aſſignees, though named, are not bound

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in the two laſt Caſes are not the ſame. In the firſt Caſe, it is becauſe the thing, covenanted to be done, has not the leaſt reference to the thing demiſed; it is a ſubſtantive, independent Agreement, not "quo-"dam modo," but "nullo modo," annexed or appurtenant to the thing leaſed. In the Caſe of the mere Perſonalty, the Covenant doth concern and touch the thing demiſed; for it is to reſtore it, or the value, at the end of the Term: but it doth not bind the Aſſignee, becauſe there is no Privity, as there is in the Caſe of a Realty, between the Leſſor and Leſſee and his Aſſigns, in reſpect of the Reverſion: it is merely collateral in one Caſe; in the other, it is not collateral, but they are total ſtrangers to one another, without any line or thread to unite and tie them together, and to conſtitute that Privity, which muſt ſubſiſt between Debtor and Creditor, to ſupport an Action.

To carry the Lien of a perſonal Obligation over to an Aſſignee, and to make him the object of an Action at the Suit of a Perſon with whom he did not originally contract, he muſt in all Caſes, where ſomething is to be done "de novo," be expreſsly named; and there muſt alſo be a Privity between the Aſſignee and the Perſon to whom he becomes engaged; and the Covenant muſt reſpect "the thing leaſed," which I conſider as the medium creating the Privity between them. The "Choſe in action," which of itſelf is not aſſignable, loſes that property under thoſe circumſtances, and, in a waiting dependent ſtate, follows its principal; and Aſſignees of Leaſes become liable to Aſſignees of the Reverſion, and Aſſignees of Reverſions become liable to Aſſignees of Leaſes; as, where Leſſors covenant to repair, to renew, Moor, 159. Reverſions are bound. Covenants between Partners, to acquit of Suit, run with the Land; to perform Divine Service, within a Manor, with

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the Lord of that Manor, and his Heirs, follows the Manor, into whoſe hands ſoever it comes, whether by Deſcent or Purchaſe. Covenants which run and reſt with Land, lie for or againſt Aſſignee at the Common Law, though not named; "terra tranſit cum onere;" Cro. Eliz. 552. Hyde *v.* Dean and Canons of Windſor. The ſame doctrine, 1 Rolls Rep. 359. They ſtick ſo faſt to the thing on which they wait, that they follow every particle of it; Cro. Car. 221. Congham *v.* King, Sir W. Jones, 245; Conan *v.* Kemiſe. For if Leſſee aſſigns twenty parts to twenty perſons, he may follow the Aſſignee of every part. If a Reverſion is broken into parts, the Aſſignee of each part may ſue. So if a Covenant relates to the improvement, melioration, and mode of Cultivation of the Eſtate, Covenant binds an Aſſignee, though not named, Cro. Ja. 125. Cookſon *v.* Cock.

All theſe Caſes clearly prove, that "inherent" Covenants, and ſuch as tend to the ſupport and maintenance of the Thing demiſed, where Aſſigns are expreſsly mentioned, follow the Reverſion and the Leaſe, let them go where they will.

Is there any difference between Lands and Tithes as to the annexation of Covenants? It is ſaid Tithes are an incorporeal Inheritance, and lie in Grant; that a Rent cannot be reſerved, becauſe not open to a Diſtreſs; that there is a privity of Contract only between the Leſſor and Leſſee, which neither the Leſſor, nor the Leſſee, can transfer to any other Perſon. As to their being incorporeal, unleſs we conſider the Covenant to be a material ſubſtance, and to require ſome ſolid Body to ſtand upon, it may wait, and be dependent, upon an incorporeal as well as a corporeal Eſtate. If we embody a Covenant, and realize it in our minds, as we do a Caſtle, it certainly cannot be built in the air, and we can have no idea of its exiſtence,

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independent of Land, and detached from it; but if we conſider a dependent Covenant, as it really is, an Agreement to do, or to omit to do, ſomething which reſpects the thing on which it depends, and to which it relates, and diveſt our minds of all ideas of matter, a Covenant may be annexed and paſs with an incorporeal Inheritance as well as with a corporeal one; and what is Land, but the Profits of it? and what is Tithe, but the tenth part of the Profits renewing annually upon it? The one is a Right to take away the tenth part when it is ſevered; the other is a Right to take away the other nine: they are tangible, viſible, and palpable, and partake of the ſame qualities, in every reſpect, as Lands themſelves; Dyer, 85. b. They are ſo far realized by the Stat. 32 Hen. VIII. that they are to be ſued for and recovered in the ſame manner as Land, and an Ejectment, or an Aſſize, lies for them; and however unreal or bodileſs they might be at the Common Law, the Act has given them the Qualities and Property of Lands themſelves, in point of Remedy againſt an unlawful Poſſeſſor or Diſſeiſor of them; and every reaſon which applies in Juſtice to paſſing Land "cum onere," applies to paſſing Tithe in the ſame manner.

It has been argued and admitted, that a Rent cannot be reſerved out of Tithe; and Co. Lit. 47. a. 2 Saund. 302. Dean and Chapter of Windſor *v.* Gover; and the Act of 5 Geo. III. c. 17. have been cited. But what is the true ſenſe and meaning of that Poſition? That it is not properly a Rent, becauſe there is nothing to diſtrain upon for it: [Rent-ſeck could not be diſtrained for, and yet it is a Rent;] for it is a Rent where it may be diſtrained for, as Rent reſerved by the King, becauſe he may diſtrain upon any Lands the Leſſee has; it does not iſſue "out of" the Tithes, but is a payment "for" them; Cro. Ja. 452.

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Dobitofte *v.* Curteene. If a Barn, worth £. 4 per ann. and Tithe, are both let together at £. 100 per ann. reſerving Rent; "in point of "Remedy it does not iſſue out of Tithes, but only out of the Barn, "where a Diſtreſs may be taken; yet the Rent reſerved is greater, "having reſpect to the Tithes;" and, in caſe of eviction, there muſt be an Apportionment; which proves that, in point of "Render," Rent does iſſue out of the Tithes, though not in point of "Re-"medy."

It is inſiſted, in Sir Thomas Raymond, 18. Tippin and Grover, that a Rent out of Tithes appertains to the Reverſion, for it is a Rent, though not in point of Remedy. It was argued, "e contra;" but Counſel, perceiving the Opinion of the Court to be againſt him, prayed a Diſcontinuance, which was granted.

Jewell's Caſe, 5 Co. 3. was a Leaſe for Life; and as there was no Remedy by Action of Debt for ſuch a Rent, the Leaſe was void. Indeed, it is ſaid at the end of that Caſe, that a Leaſe for years would have been ſo; but that was extrajudicial; and in a ſubſequent Caſe, Cro. Ja. 111. Talentine *v.* Denton, the Law was held to be otherwiſe.

The Caſe in 2 Saund. 302. was not determined; but as far as it goes, the Court ſeemed to incline that it was ſuch a Rent as would go with the Reverſion, and that the Aſſignee ſhould be obliged to pay it.

The 5th Geo. III. c. 17. recites it only as a doubt, and provides for it; but before, the Law was clear that the Rent would go with the Reverſion, and that an Action of Debt would lie for Rent on a Leaſe for Years: It always went with the Reverſion to Grantees or Heirs at Law, and the legal Remedy goes along with it. The Succeſſor is the ſame as an Heir.

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2 Vern. 423. is only a ſaying of Counſel: it was not ſaid with reference to Tithe, viz. "poſſibly the Aſſignees might not be liable at "Law, if it was an incorporeal Inheritance, for they had not privity "of Eſtate." 1 Salk. 198. Lord Raymond, 322. Grant of Rent-Charge and Covenant for Enjoyment, free from Taxes; the Queſtion was, if it follow the Land into the hands of Aſſignee; Holt, in Salk. thought not, but there was no Judgment; and Lord Raymond, with three Judges, were of a different Opinion againſt Holt; and this is the better Opinion, if Notice of the Covenant repel the Right of deducting the Taxes; and the Caſe of the Covenant to acquit of Suit from one Parcener to another, is in point in ſupport of it. 5 Co. 24. b. Dean and Chapter of Windſor's Caſe. If Leſſee covenant to diſcharge Leſſor, "de omnibus oneribus ordinariis & extraordinariis, and to repair," Action lies againſt Aſſignees.

If there is no difference between Land and Tithe, the only Queſtion in this Caſe is, whether a Covenant, expreſsly naming the Aſſigns to receive the Tithe in kind, will follow and accompany the Leaſe into the hands of the Aſſignee, and bind him to a performance of it. We are of opinion that it will; and if the Covenant had not named Aſſigns, it might be very plauſibly argued that it would have bound him as effectually as a Covenant to repair, or occupy the Eſtate in any particular manner preſcribed by the Leſſor. The Covenant "to repair" clearly binds an Aſſignee, though not named; and according to Moor, 159. even to build a Wall, though Aſſignees are not named, is an inherent Covenant, and binds them; "By the acceptance of "the Poſſeſſion, he makes himſelf ſubject to all Covenants concern-"ing the Land, though not to collateral Covenants; and Covenants "of Repair, and of building Walls or Houſes, are Covenants "in-

"herent"

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" herent" in the Land, with which the Aſſignees, without ſpecial " words, ſhall be bound." But it is not neceſſary to diſcuſs that Queſtion, (and Spencer's Caſe is contrary,) becauſe the Aſſigns are expreſsly mentioned here; and therefore in a Leaſe of Land, they would clearly be bound by all Covenants for the performance of what is to be done upon the Land; and the Caſe in Cro. Ja. is an Authority in point, that Covenants, preſcribing how Land ſhall be occupied, would bind the Aſſignees, though not named: a mode of occupying the " thing let," is ſo interwoven with the original Contract, as to become an eſſential part of it; it is as much a part of the Conſideration of the Leaſe as the Rent is; and therefore, whenever that Contract is aſſigned, the Aſſignee muſt take the whole Contract together.

What is this Covenant, but a mode of Occupation preſcribed by the Leſſor, for the reaſons already mentioned? It is laying down a Rule how and in what manner the " thing demiſed" ſhall be managed. It ſhall be taken in kind, like a Covenant from a Tenant of Land, not to ſell ſtraw or dung, or lop trees, or to make ditches or trenches, or do, or omit to do, any other Act reſpecting the Cultivation of the thing demiſed; and it is both within the Rule, and indeed the Words, of Lord Coke, in the ſecond branch of what he lays down in Spencer's Caſe: it touches and concerns " the thing demiſed" moſt eſſentially; it extends to the ſupportation of it; for by commanding the Tithes to be taken in kind, it averts and protects it againſt its moſt mortal enemy, a unity of Poſſeſſion. Aſſigns are expreſsly named; and here is a Reverſion in the Leſſor, and therefore a Privity; and Lord Coke ſays, " the Aſſigns are not bound in a " Leaſe of mere Perſonalty, becauſe there is no Privity, as there is " in the Caſe of Land, in reſpect of the Reverſion."

Land

Land and Tithe are the ſame. This Covenant may be compared to Covenants in Leaſes not to aſſign.—Caſes have been cited to ſhew theſe are collateral Covenants; and they certainly are ſo: and we admit the Authority of all thoſe Caſes, viz. Pennant's Caſe, 3 Coke, 64. Styles, 265. Collins *v.* Sillye,—collateral. Moor, 243. Godbolt, 120. James *v.* Blunch. The word "Aſſigns" is not in the Covenant. They do not concern or touch the "thing demiſed;" they are as collateral as to deliver a horſe, or pay a ſum in groſs. Hardres, 88.—A mere Perſonalty, no Privity. Bally againſt Wells.

But this is a Covenant of a very different nature and import: a Covenant "not to aſſign," has only for its object who ſhall occupy it; there is nothing to be done in the Land, nor upon it. Lord Coke. Pennant's Caſe; it may be contrived ſo ſecretly, that no body may know of it; it is collateral. But this Covenant has for its object, not "who" ſhall occupy, but "how" it ſhall be occupied; it is to enforce the Occupation as a Tithe; let it go where it will, it ſhall be enjoyed in the ſame form, plight, and condition, as it is delivered to the Leſſee: the Covenant leaves it quite open, and as a matter of total indifference "who" the occupier is, provided it is occupied as a Tithe, and taken in kind: for the Covenant, not to let the Farmers have the Tithe, is nothing more nor leſs than a Covenant that they ſhall be taken in kind; for they muſt be taken in kind, if the Farmers themſelves are not to have them. In another reſpect it is totally different; the Covenant, not to aſſign generally, muſt be quite perſonal and collateral; for it can only affect the Leſſee himſelf, and is ſo far from being meant to reach the Aſſigns, that it is inſerted to prevent there ever being any Aſſigns at all: whereas this Leaſe grants the Tithes to the Leſſee, his Executors, Adminiſtrators, and Aſſigns; and

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and the Covenant is only to keep them in "eſſe," and in that ſeparate ſtate of exiſtence, which they would loſe by being blended and confounded with the other nine parts in the hands of the Farmers; and though I admit a Covenant "not to aſſign generally" is collateral, and collateral Covenants, not relating to the thing demiſed, do not bind the Aſſignee; yet no Caſe has been cited, that a Covenant for Leſſee and his Aſſigns, not to aſſign to a "particular perſon," would not bind him; and I think it would, for it falls within every Rule laid down by Lord Coke, in Spencer's Caſe. A Covenant to do any thing upon Land, "de novo," as to build, though a collateral Covenant, binds Aſſignees, if named, and will not bind them, unleſs named; ſo here, it relates to the Thing, Aſſigns are named, and there is Privity; but this Covenant is more, becauſe it is the Guardian of the Thing demiſed.

Suppoſe, in a Leaſe of Land, a Covenant for Aſſigns to ſet out the Tithes in kind, without making any Compoſition or Agreement for them with the Parſon or Impropriator; this would be a proper Covenant, where part is exempt and part not, to prevent an application of Payment to the whole: Would it not bind the Aſſignee, as a Regulation of the manner in which he would have his Farm enjoyed? This is nothing more than that Covenant inverted: the one is, "you ſhall not give money;" this is, "you ſhall not take it." The Caſe put is, "you ſhall pay it in kind;" the preſent Caſe is, "you ſhall receive it in kind."

It was ſaid, that by the Aſſignment to a Perſon, not within the Reſtriction, it was totally vaniſhed; and Cro. Jac. 398. Whitchcot *v.* Fox, was cited to prove, that if there was a Covenant not to alien, except to a Brother, and an Alienation was made to a Brother, the Brother might alien to any body elſe. This is rather a ſtrong Caſe,

and

and certainly repugnant to the Intention of the Parties, which was to keep the Eſtate in the Family of the Leſſee: but admitting that Caſe to be Law, yet it does not apply; for the Brother being totally excepted, he takes the Aſſignment exactly in the ſame manner as if there had been no Covenant at all: whereas the Covenant here does not reſtrain the Aſſignment, with an exception of any particular Perſon, but leaves it open to an Aſſignment by all, ſubject to ſuch Terms as affects the very vital principle of the "Thing let" in the hands of the Leſſee himſelf.

In the Caſe put, the Covenant did not affect the right of aſſigning to a Brother in the hands of the Leſſee: therefore it could not affect it in the hands of his Aſſignee: but this Covenant bound the Leſſee; and for the Reaſons and upon the Diſtinctions mentioned, it binds the Defendant, his Aſſignee.

We do not think it a mere collateral Covenant, unconnected with the Tithe; but a Covenant materially and eſſentially tending to preſerve the "Thing demiſed," and as ſuch, obligatory on the Aſſignee, and therefore there muſt be

JUDGMENT FOR THE PLAINTIFF.

IN THE COMMON PLEAS.

FROGMORTON, on the Demiſe of ROBINSON, againſt WHARREY.

1770. Frogmorton againſt Wharrey. V. 2. Blackſtone, 728.

THIS was a Special Caſe in an Action of Treſpaſs and Ejectment, wherein the Plaintiff Declared for one Meſſuage, one Cottage, twenty acres of Land, twenty acres of Meadow, and twenty acres of Paſture, with the appurtenances, in Hemingbrough otherwiſe Hembrough, in the County of York.

To this Declaration the Defendant pleaded the general Iſſue, and thereupon Iſſue was joined.

The Cauſe came on to be tried at the Aſſizes held for the County of York, before the Honourable Mr. Juſtice GOULD; when it appeared in Evidence, as follows; that

JOHN ROBINSON being ſeiſed in Fee, according to the Cuſtom of the Manor of Hemingbrough, of the Premiſes in Queſtion, which were Copyhold, held of the ſaid Manor, on the 1ſt day of Auguſt 1720, ſurrendered the ſame, according to the cuſtom of the ſaid Manor, to the uſe of MARY ARNALL (whom he then intended to marry) and the Heirs of their two Bodies lawfully to be begotten; and for default of ſuch Iſſue, to the uſe of the right Heirs of the ſaid JOHN ROBINSON.

The ſaid Marriage took effect; and afterwards, to wit, at a Court held for the ſaid Manor on the 21ſt Day of October 1720, the ſaid

MARY

MARY was admitted Tenant to the ſaid Premiſes, according to the ſaid Surrender, to the uſe of the ſaid MARY, and the Heirs of their two Bodies, lawfully to be begotten; and for default of ſuch Iſſue, to the uſe and behoof of the right Heirs of the ſaid JOHN ROBINSON, according to the Cuſtom of the ſaid Manor.

The ſaid MARY died in 1735, leaving JOHN, her eldeſt Son, begotten by the ſaid JOHN ROBINSON, her Huſband, which Son was born in the year 1722.

That the ſaid JOHN ROBINSON, the Son, died in 1745, leaving the Leſſor of the Plaintiff, his only Son and Heir, born in that year, who was duly admitted Tenant to the ſaid Premiſes in the year 1769.

By the Cuſtom of the ſaid Manor, Huſbands are entitled for Life to the Inheritance of their Wives, in the nature of Tenants by the Courteſy, whether the Wife is ſeiſed before the Coverture or afterwards.

JOHN ROBINSON, the Surrenderor, ſurvived his Wife, and continued in poſſeſſion till the year 1746, when he ſurrendered the Eſtate to the Defendant in Fee, who was admitted, and had been in Poſſeſſion ever ſince; and the ſaid JOHN ROBINSON, the Surrenderor, died in 1767.

The ſaid JOHN ROBINSON, the Surrenderor, conceiving himſelf Tenant in Tail, under the Surrender, and admittance in 1720, did the proper Act to bar an Eſtate Tail, provided ſuch Eſtate was veſted in him, according to the Cuſtom of the ſaid Manor, previous to the Surrender to the Defendant WHARREY.

Whereupon a Verdict was given for the Plaintiff, ſubject to the Opinion of the Court on the following Queſtion:

Whether the Plaintiff is entitled to recover or not?

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And after this Caſe had been twice argued, by Nares and Burland, Serjeants, for the Plaintiff, that this was an Eſtate Tail in the Wife; and by Jephſon and Foſter, Serjeants, for the Defendant, that this was an Eſtate for Life in the Wife, with a contingent Remainder to the Heirs of the two Bodies of her and her Huſband;

Lord Chief Juſtice WILMOT delivered the unanimous Opinion of the Court:

IT is impoſſible to read this Caſe, without wiſhing to conſtrue this Limitation in ſuch a manner as to give it an effect in favour of the Leſſor of the Plaintiff.

The Settlement was made before the Marriage, when a Proviſion for Children is the object of both the Parents care, but particularly the Mother's; and moſt probably they both thought that the Eſtate was effectually ſecured to the Iſſue of the Marriage, at all Events; or at leaſt that the Iſſue could not be defeated but by their joint concurrence.

Unluckily for them, that could not be the conſequence even if an Eſtate Tail had been veſted by this Limitation in the Wife, 2 Syd. 73. Harrington *v.* Smith; for Copyholds, not being within the protection of the 11 Hen. VII. the Wife, ſurviving, might herſelf have defeated the Iſſue, and carried the Eſtate to the Iſſue of a ſecond Huſband; but if that legal Right would have accompanied ſuch a Limitation, it would certainly have come nearer the Intention of the Settlement, to give the Wife an Eſtate Tail, though attended with a Power of barring, if ſhe ſurvived, than to give the Limitation to

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the Iſſue, which would have had no effect at all in caſe ſhe died before her Huſband; and therefore, we have moſt anxiouſly endeavoured to diſcover ſome ſolid ground to ſtand upon, for the giving an exiſtence to this Limitation, after the death of the Wife, in favour of the Iſſue; but the Words and the Authorities are too ſtrong for us, and it ſeems to me to be one of thoſe Caſes where we cannot do as we wiſh, without bending the Law more than we ought.

And there is one deciſive reaſon againſt ſtraining the words to give an Eſtate Tail, ariſing from the frame of the Surrender. For it muſt be conſidered as it ſtood originally, the inſtant after it was made; neither the Marriage, nor any ſubſequent event, can vary the conſtruction of it; and if the Marriage had never taken place, the Wife would have taken the ſame quantity of Eſtate, as ſhe had after the Marriage; and, whatever might have been done in a Court of Equity, a Court of Law could not have controuled the legal operation of the Surrender.

The common Law, out of that tender regard which, in a variety of Caſes, it ſhews for the female Sex, has provided a Writ, "Cauſa Matrimonii prælocuti," to fetch back again an Eſtate, made in contemplation of Marriage, where it has not taken place; but no ſuch Redreſs is given to a Man. Co. Lit. 204. And then ſee what would be the conſequence of giving the Wife an Eſtate in ſpecial Tail, by conſtruing theſe words to relate only to the Heirs of her body by JOHN ROBINSON to be begotten; ſhe might have barred the Reverſion in JOHN ROBINSON, and acquired the whole Inheritance of the Eſtate, even in the life-time of the Surrenderor; whereas, by conſidering theſe words not as words of Limitation, but as deſcriptive of the Perſon to take, and as words of Purchaſe, ſhe could not defeat

the

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the Surrenderor; but when ſhe had died, the contingent Remainder could not have taken place, and the Reverſion in Fee would have fallen into poſſeſſion: for we take the Caſe in 1 Leo. 101. Allen and Palmer, not to be Law; and that the Reverſion remains in the Surrenderor, as in the Caſe of a Conveyance of a Freehold Eſtate, either at the common Law, or upon the Statute of Uſes. Co. Lit. 22. 6. Fenwicke and Mitford's Caſe. Surrender of Copyhold, and Grant of Freehold, muſt have the ſame legal Operation.

This would certainly have been the conſequence of giving the Eſtate in ſpecial Tail to the Wife, on the event of her not having married the Surrenderor; and though that was certainly not an Event then in their contemplation, but a ſubſequent Marriage; yet we muſt conſider the Surrender, and conſtrue it in the ſame manner as if that Event had happened, and the Caſe now before us upon that Event.

It has been very properly urged at the Bar, that the Will of the Donor is to be attended to in creating Eſtates Tail; and that the Intention muſt be effectuated if poſſible: but this Will and Intention muſt be taken from the words of the Deed.—What are the Words? "To the Heirs of their two bodies lawfully begotten, and for default "of ſuch Iſſue, to the uſe of the right Heir of the ſaid JOHN "ROBINSON;" that is, that nobody ſhall take this Eſtate, but who is the Heir of the Body of the Huſband as well as of the Wife. Is the eldeſt Son of the Body of the Wife, the Heir of the Body of the Huſband whilſt he is living? Certainly not. And therefore, ſuppoſing it an Eſtate Tail, qualified and reſtrained, like the Caſe put in Page and Hayward, 2 Salk. 570. of an Eſtate limited to A. and the Heirs of her Body begotten by a "Searle," or by any particular perſon of the name of "Searle," the Heir of the

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the Body of the Wife is not ſo qualified; unleſs the other part of the Qualification meets, or is found in the Heir of her Body, viz. "Heir alſo of the Body of the Huſband," the Qualification is not complete, the deſcription is not anſwered. He has only one part of the Character which the Donor has required; and though it is ſaid, we may conſtrue theſe words, "Heirs of their Bodies," to mean "Heirs of the Body of the Wife by the Huſband begotten," and then the Limitation in the Event that hath happened will take place,—I ſay ſubſequent Events are not to influence the conſtruction of the Words. What Authority have we to controul the plain obvious ſignification and import of theſe Words? We might be equally warranted to turn them the other way, and to ſay, "Heirs of the Body of the Huſband begotten on the Body of the Wife," as "Heirs of the Body of the Wife begotten by the Huſband." When Words are doubtful, we may decide the Doubt in favour of apparent Intention: but, when Words are clear, plain, and expreſs, and have a proper Operation to check ſuch a conſequence as I have mentioned, in caſe the Marriage had not taken effect at all, we can neither go on one ſide nor the other; but muſt conſider them according to their obvious import, and as deſcribing the "Heirs of both their Bodies, without inclining more to one than the other: and let the legal conſequences of that Conſtruction be what they will, we cannot help it. The owner has ſaid, "no child ſhall have this Eſtate after my Wife's death, if I am living, for no children can be Heirs of my Body, whilſt I live." But whether he ſaw that legal conſequence or not, we cannot controul the Rule of Law, "nemo eſt hæres viventis," without ſhaking Property to its foundations.

It

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It is not at all improbable, but he thought the Limitation might wait, and not execute in any body till he died, as he was to be Tenant of it by the Courteſy; or he might think it as right to leave the Iſſue in his power, if he ſurvived, as to put them into his Wife's power, if ſhe ſurvived: but whatever their Intentions were (which is matter of conjecture) we muſt not reject one part of the deſcription, and conſtrue the words to mean "Heirs of her Body only," when the Donor has ſaid, he gives it to the "Heirs of the Bodies of both;" and they may be different Perſons. For ſuppoſe two Sons at the death of the Wife, the eldeſt dies without Iſſue, in the life of the Father; then the Father dies, the youngeſt Son is the Heir of the Body of the Father, and the Mother alſo; the eldeſt Son, at the death of the Mother, has one part of the deſcription; the youngeſt, at the death of the Father, has both. But we do not think it a "qualified Eſtate Tail," or that any Eſtate Tail is veſted by theſe words in the Wife, becauſe no ſuch Eſtate, as is here deſcribed, can deſcend from her. Where an Eſtate is limited to Huſband and Wife, and the Heirs of their two Bodies, there is an Eſtate Tail veſted in the Huſband, which deſcends. But when the Eſtate is limited to the Wife, and the Heirs of the Bodies of the Huſband and Wife, the Heirs of the Body of the Huſband cannot be words of Limitation; becauſe there is no precedent Eſtate given to be limited, and then theſe words, "Heirs of the Body of the Huſband," muſt be words of Purchaſe: as if an Eſtate was given to a Woman and the Heirs of the Body of the Huſband, on the Wife to be begotten, they muſt be words of Purchaſe; becauſe the words of Entail do not apply to the Wife. An Eſtate Tail cannot deſcend from her to the Heirs of the

Body

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Body of another perſon: and therefore no ſuch Eſtate can poſſibly be ingrafted upon her. They muſt be words of Purchaſe, or can have no Operation at all; and there is no difference made, as to the Operation of theſe words, by mixing or joining them with "the Heirs of the Body of the Wife," to whom an Eſtate is limited; for the deſcription of the perſons to take being intire, both qualities are neceſſary to centre in one and the ſame perſon.

Theſe Words, which would be words of Limitation, if applied ſolely to the Wife, muſt be turned into Words of Purchaſe when applied to both, or they can have no effect at all: The company they keep neceſſitates ſuch a Conſtruction, to give the Intention of the Grantor a chance of being effectuated.

The Caſe in Littleton, ſect. 352. as put by Littleton in the firſt Editions, by which the common printed Editions ſhould be corrected, plays great light upon the Queſtion.

In the common Editions, the Caſe is put, that if a Feoffment be made upon Condition that the Feoffee ſhall give the Land to the Feoffor and his Wife, to have and to hold to them and to the Heirs of their two Bodies engendered, and for default of ſuch Iſſue, Remainder to the Heirs of the Feoffor; if the Huſband die before any Eſtate Tail is made, living the Wife, the Eſtate ſhall be made by the Feoffee, "cy pres;" that is, to the Wife for Life without impeachment of Waſte, Remainder to the Heirs of the Body of her Huſband "on her" begotten, Remainder to the right Heirs of the Huſband. Now as ſtated here, it is limited to the Heirs of the Body of the Huſband, "on the Wife begotten;" and as he was dead, it would be a veſted Remainder, and might warrant the application of theſe words to one inſtead of both: but in the old Editions of Lettou and Mack-

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linia, and the Roan Edition (both of which my Brother Blackſtone is in poſſeſſion of) it is limited to the Heirs of the Body of her Huſband "and her" engendered; not a veſted Eſtate Tail, but a contingent Remainder to the Heirs of both their Bodies, as in this Caſe.

And the Caſes in Dyer, 64. 99. in Lane and Pannell, 1 Rolles Rep. 238. 317. and 438. and in Goſſage and Taylor, as ſtated by the Manuſcript and the Record, are very material Authorities to ſhew that where a Limitation is to the Heirs of the Body of the Huſband and Wife, and there is no Eſtate limited to the Huſband, they do not give any Eſtate Tail to the Wife to whom an Eſtate is limited; but are words of Purchaſe *(a)*; the only difference between thoſe Caſes and this is, that the Eſtate is there limited to the Wife for Life, in expreſs words, and after her deceaſe to the Heirs of the Body of the

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(a) This Caſe is in Styles's Reports, 325, which, from a Manuſcript of Lord Hale, in poſſeſſion of Mr. Juſtice Bathurſt, appears to have been firſt determined in Hil. 1651; and this accounts for ſome expreſſions of Chief Juſtice Rolle, in the Caſe in Styles, which was in Paſch. 1652.

The Caſe, in the Manuſcript, is:

That Sir Richard Frank levied a Fine of the Manor of Bottington, in Eſſex, to the uſe of himſelf during the joint lives of himſelf and his Son Leventhorpe Frank; and after the deceaſe of either of them, to the uſe of Suſan Cotell, for her Life, and after her deceaſe, to the uſe of the Iſſue male of the ſaid Suſan and Leventhorpe, and in default of ſuch Iſſue, to the uſe of the Heir to be begotten upon the Body of Suſan by the ſaid Leventhorpe; and in default of ſuch Iſſue, to the uſe of the right Heir of the ſaid Richard. The Marriage was had; Suſan died, leaving five Daughters and no Son. Richard died, leaving Leventhorpe his Son and Heir, who is ſtated by the Special Verdict to be then living, and who entered and demiſed to the Defendant. The Plaintiff claims under a Demiſe from the Daughter. Reſolved, 1ſt. If Huſband Joint Tenant, an Eſtate Tail in both, v. Litt. Sec. 28. *(a)* 2d. That neither Huſband nor Wife, had an Eſtate Tail; not Huſband, becauſe nothing is given to him; nor the Wife, becauſe though ſhe take an Eſtate for Life, yet the Heirs are not applied to her Body.

(a) v. Har. Co. Litt. p. 26. a.

3d. That it is a contingent Remainder to the Heirs of both their Bodies.

Huſband

Frogmorton againſt Wharrey.

Huſband and Wife begotten: whereas the Eſtate is limited here, to the Wife and the Heirs of their Bodies begotten: at firſt view, it looks more like an intentional contingency in one Caſe than the other; but upon legal principles they muſt have the ſame effect; for an Eſtate limited to A. for Life, and after his deceaſe to the Heirs of his Body, have exactly the ſame legal operation as to A. and the Heirs of his Body; and therefore, if they will not give an Eſtate Tail to the firſt taker in one Caſe, they will not in the other; and the Reaſon applies equally to both,—no ſuch Entail can be created; an Eſtate cannot be made to deſcend to the Heirs of the Body of a perſon who takes nothing; and therefore, when the Huſband can take nothing, as in the Caſe put by Littleton, the Wife's Eſtate, which would here have been an Eſtate Tail, is turned into an Eſtate for Life, without Impeachment of Waſte, with a contingent Remainder to their Iſſue. We are all therefore of Opinion that

JUDGMENT of NONSUIT muſt be entered.

IN THE EXCHEQUER CHAMBER.

CATHARINE LOW, PLAINTIFF - - - - -
NEWSOME PEERS, DEFENDANT - - - } IN ERROR.

PLEAS in the Exchequer Chamber, at Weſtminſter, before Sir JOHN EARDLEY WILMOT, Knight, Chief Juſtice of the Common Bench; Sir THOMAS PARKER, Knight, Chief Baron of the Exchequer; Sir EDWARD CLIVE, Knight, the Honourable HENRY BATHURST and Sir HENRY GOULD, Knight, the Three other Juſtices of the Common Bench; and alſo before Sir SYDNEY STAFFORD SMYTHE, Knight, Sir RICHARD ADAMS, Knight, and GEORGE PERROTT, Eſquire, the Three other Barons of the Exchequer, on Monday the 14th day of November, in the ninth year of the reign of King George the Third, &c.

1770. Low againſt Peers. v. 4 Bur. 2225.

OUR Sovereign Lord the King hath ſent to his right truſty and well beloved William Lord Mansfield, his Majeſty's Chief Juſtice appointed to hold pleas before the King himſelf, his Writ cloſed in theſe words, (that is to ſay): George the Third, &c. To our right truſty and well-beloved William Lord Mansfield, our Chief Juſtice, appointed to hold Pleas before us, Greeting: Whereas by a Statute made, &c. the 23d November, in the 27th Elizabeth, late Queen of England, IT WAS by the Authority aforeſaid (amongſt others things) Enacted, that when any Judg-

ment, at any time thenafter, ſhould be given in the Court of King's Bench, in any Suit or Action of Debt, Detinue, Covenant, Account, Action upon the Caſe, Ejectment, or Treſpaſs, firſt commenced or to be commenced there, other than ſuch only where we ſhould be a Party, the Plaintiff or the Defendant againſt whom ſuch Judgment may be given, may at his Election ſue forth out of the Court of Chancery, a ſpecial Writ of Error, to be deviſed in the ſaid Court of Chancery, directed to the Chief Juſtice of the ſaid Court of King's Bench for the time being, commanding him to cauſe the Record, and all things touching the ſaid Judgment, to be brought before the Juſtices of the Common Bench, and the Barons of the Exchequer, into the Exchequer Chamber; which ſaid Juſtices of the Common Bench, and Barons of the Exchequer, or ſix of them at the leaſt, by virtue of the ſaid Act, ſhall thereupon have full Power and Authority to examine all ſuch Errors as ſhall be aſſigned or found in or upon ſuch Judgment, and thereupon to Reverſe or Affirm the ſaid Judgment as the Law ſhall require, other than for Errors to be aſſigned for or concerning the Juriſdiction of the ſaid Court of King's Bench, or any want of any Form in any Writ, Return, Plaint, Bill, Declaration, or other Pleading, Proceſs, Verdict, or Proceeding whatſoever; and that after the ſaid Judgment ſhall be Affirmed or Reverſed, the ſaid Record and all things touching the ſame ſhall be removed and brought back into the ſaid Court of King's Bench, that ſuch further Proceedings may be made thereupon, as well for Execution as otherwiſe ſhall appertain, as in the ſaid Statute is more fully contained: And foraſmuch as in the Record and Proceſs, as alſo in giving of Judgment, in a Plaint which was before us by a Bill, between CATHERINE Low and NEWSOME PEERS, of a Plea of Breach of Covenant, as it is ſaid,

Low againſt Peers.

manifeſt

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manifeſt Error hath intervened, to the great Damage of the ſaid CATHERINE, as by her Complaint we are informed, which ſaid Error no ways toucheth us or the Juriſdiction of the ſaid Court of King's Bench, or any want of Form in any Writ, Return, Plaint, Bill, Declaration, or other Pleading, Proceſs, Verdict, or Proceeding whatſoever, as we are informed: WE therefore willing that the ſaid Error (if any be) be duly amended, according to the form of the ſaid Statute, and full and ſpeedy Juſtice done to the ſaid Parties in this behalf, DO command you, that if Judgment be given thereupon, you cauſe the Record and Proceſs aforeſaid, with all things touching the ſame, to come before our ſaid Juſtices of the Common Bench, and Barons of our ſaid Exchequer, into our ſaid Exchequer Chamber, on Monday, the 14th day of November next enſuing, that the ſaid Juſtices and Barons, viewing and examining the Record and Proceſs aforeſaid, may cauſe further to be done thereupon for amending the ſaid Error as of right, and according to the form of the ſaid Statute, ſhall be meet to be done. Witneſs ourſelf at Weſtminſter, the 22d June, in the eighth year of our reign.

BROWNE.

[The Anſwer of William Lord MANSFIELD, Chief Juſtice within named:]

The Record and Proceſs of the Plaintiff within mentioned, with all things touching the ſame, to the Juſtices and Barons within ſpecified, at the day and place within contained, I certify, in a certain Schedule to the Writ annexed, as I am within commanded.

MANSFIELD.

PLEAS,

PLEAS, &c.

Low againſt Peers.

CATHERINE Low, complains of NEWSOME PEERS, of a Plea of a Breach of Covenant, for that WHEREAS, on the 25th July 1757, at London, in the Pariſh of Saint Mary-le Bow, &c. the Plaintiff, at the Defendant's requeſt, agreed to marry him, and thereupon, and in Conſideration thereof, the Defendant, by Deed of the 25th July 1757, promiſed the Plaintiff, that he would not marry with any Perſon beſides herſelf, and if he ſhould marry with any other Perſon, then he agreed to pay her one thouſand pounds, within three months after his Marriage with any other Perſon; and that ſhe hath remained ſole and unmarried, and was always willing to marry the ſaid NEWSOME, whilſt he continued ſole and unmarried; and that the ſaid NEWSOME did on the 30th April 1767, marry another Perſon, namely, Elizabeth Gardiner, &c.; and that the ſaid NEWSOME did not (though often requeſted) pay to the ſaid CATHERINE the ſaid one thouſand pounds.

There was alſo another count to the following purport, viz.: And whereas alſo the ſaid NEWSOME, on the ſaid 25th July 1757, at London aforeſaid, in the Pariſh, &c. aforeſaid, being then alſo ſingle and unmarried, by his certain other Deed, then and there made, and which ſaid Deed, ſealed with the Seal of the ſaid NEWSOME, the ſaid CATHERINE now brings here into Court, the Date whereof is the ſame day and year aforeſaid, did promiſe to the ſaid CATHERINE, ſhe being then ſole and unmarried, that he would not marry with any other Perſon beſides herſelf, the ſaid CATHERINE; and if he ſhould marry with any other, then he by the ſaid Deed, did agree to pay to her the ſaid CATHERINE £. 1,000, within three months after ſuch Marriage with any other Perſon: And the ſaid CATHERINE in fact

ſaith,

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ſaith, that from the time of making of the ſaid Deed, hitherto ſhe hath remained and yet is ſole and unmarried, and was always ready and willing to marry and take to Huſband the ſaid NEWSOME, whilſt he continued ſole and unmarried, whereof the ſaid NEWSOME during all that time had Notice. And the ſaid CATHERINE, further in fact ſaith, that the ſaid NEWSOME did, after the making the ſaid laſt-mentioned Deed (that is to ſay) on the 30th April 1767, marry another Perſon than the ſaid CATHERINE, namely, one Elizabeth Gardiner, yet the ſaid NEWSOME (although often requeſted) did not within three months after ſuch Marriage, or at any other time, pay to the ſaid CATHERINE £. 1,000, or any part thereof, but therein wholly failed and made default, contrary to the form and effect of the ſaid Covenant of the ſaid NEWSOME ſo made in that behalf as aforeſaid; and ſo the ſaid CATHERINE ſaith, that the ſaid NEWSOME (although often requeſted) hath not kept with her the Covenant ſo made between them as aforeſaid, but hath broken the ſame, and to keep the ſame with the ſaid CATHERINE, he the ſaid NEWSOME hath hitherto altogether refuſed, and ſtill doth refuſe; whereupon the ſaid CATHERINE ſaith, ſhe is injured, and hath ſuſtained Damage to the value of £. 2,000, and therefore ſhe brings Suit, &c.

To both which Counts the Defendant pleaded the General Iſſue, and thereupon Iſſue was joined.

This Cauſe being tried before Lord MANSFIELD, the Jury find that the ſaid Writing in the ſaid firſt Count of the ſaid Declaration mentioned, is "not the Deed" of the ſaid NEWSOME, mentioned in manner and form aforeſaid, as the ſaid NEWSOME hath in his ſaid Plea within alledged; and the Jurors aforeſaid, upon their Oath aforeſaid, further ſay, that as to the ſecond Iſſue within joined between

tween the Parties, the ſaid Writing in the ſaid ſecond Count of the ſaid Declaration mentioned, "is the Deed" of him the ſaid NEWSOME, as the ſaid CATHERINE hath within alledged; and they aſſeſs the Damages of the ſaid CATHERINE by reaſon of the Premiſes, beſides her Coſts and Charges by her laid out and expended about her ſuit in this behalf, to £. 1,000, and for thoſe Coſts and Charges to 40 s. Low againſt Peers.

This Judgment was afterwards arreſted in the Court of King's Bench, from whence a Writ of Error was brought into the Exchequer Chamber; and after Argument,

Lord Chief Juſtice WILMOT delivered the unanimous Opinion of the Court. May 1770.

After ſtating the Proceedings, he ſaid,

THERE are two Queſtions:

The 1ſt Queſtion is, Whether a Covenant not to marry any Perſon but the Covenantee, under the Penalty of £.1,000, without any Conſideration whatever to ſupport it, is valid in point of Law, and whether an Action will lie to recover the Penalty?

The Counſel at the Bar, who argued this Caſe for the Plaintiff with great ability, admitted that the Civil Law had a violent averſion to all reſtraints upon Marriage; and that the Court of Chancery followed the Rule of the Civil Law, in Caſes where they exerciſed a concurrent Juriſdiction with Civil Law Courts; but contended that the Common Law had not adopted that averſion, and reprobated all reſtraints upon Matrimony, as the Civil Law did: and they mentioned the Caſe of Eccleſiaſtics, and Maſters in Chancery formerly, and Fellows of Colleges; and that by particular Modes and Proviſions

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ſions Marriage may be checked; as by limiting Eſtates while Grantees remain Sole and unmarried; or agreeing to pay a Sum of Money upon Marriage, which will have the ſame effect as agreeing not to marry under a Penalty; and this kind of reaſoning was very ſkilfully introduced, in order to divide this Covenant; and, ſuppoſing the firſt part of the Deed, not to marry, to be illegal, yet that the ſecond part of it might operate as a Promiſe to pay £. 1,000 upon Marriage, which is legal; and many Caſes were cited to ſhew the difference between Bonds void by Statute and at the Common Law; and that one part of a Condition may be good and an Action maintainable for a breach of it, though another part is bad. It is not neceſſary to ſtate or conſider thoſe Caſes, for the fact does not warrant the Application of them, becauſe this Deed contains an entire Agreement which muſt be taken altogether; and there is not the leaſt pretence to divide and ſeparate it into diſtinct and different parts. The Penalty waits upon the Contract, and is to ſecure the performance of it. The Covenant is the Law, and the Penalty the Sanction of it; and therefore the Queſtion firſt put is the true Queſtion, viz. "whe- "ther a Covenant not to marry any body except the Covenantee "under a Penalty," induces ſuch a valid legal Obligation, that the Courts of Common Law will ſuſtain an Action for the breach of it; and as there are no Caſes directly in point, it may not be improper to mention the reaſons particularly which determine us to think that this Covenant is void, and that no Court of Juſtice ought to entertain an Action for the violation of it.

Upon the firſt view of this Queſtion, the Maxim, cited at the Bar, of "volenti non fit injuria," ſeems to favour ſuch a Covenant: that every man has a right, "diſponere de ſuo jure;" and as the Law does

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does not oblige any body to marry, but leaves a free Agency in that reſpect to every member of this Community, it is not an Agreement to omit what the Law commands; but an Agreement to omit, what the Law leaves to every one's own choice to omit if he pleaſes. And ſo far as reſpects obedience to the poſitive Law of this kingdom, the Argument is unanſwerable: but, beſides legal Obligations, every member of Civil Society is under a variety of moral Obligations, which Municipal Laws do not enforce, but which the Law of Nature, which is the Law of God, calls upon him to perform. It would be endleſs to enumerate the Duties which are the objects of moral Obligations, both in a ſtate of Society and out of it; Gratitude, Charity, and all Parental and Filial Duties, beyond mere Maintenance; Friendſhip, Beneficence in all its various branches, and many more, which might be named, are Duties of perpetual Obligation: and I cannot name a greater than Matrimony, being one of the firſt Commands given by God to Mankind after the Creation, repeated again after the Deluge, and ever ſince echoed, by the voice of Nature, to all Mankind. For the precept of Multiplication has been always expounded, by the civilized part of the World, to mean Multiplication by the medium of Matrimony, and not by promiſcuous Copulation; and there cannot be a Duty of greater importance to Society, becauſe it not only ſtrengthens, preſerves, and perpetuates it, but the Peace, Order, and Decency of Society, depend upon protecting and encouraging it.

The point therefore to be conſidered, is, whether a Covenant to omit ſuch a Duty, ought to be enforced "in foro civili."

The Writers upon the Law of Nature, conſider Contracts, to omit ſuch Duties, as void; nay, they conſider an Oath to perform them as not obligatory. Grotius, 2 Lib. cap. 13. ſect. 67. "Ut valeat Jura-

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" mentum, oportet Obligatio ſit licita; quare nullas vires habebit " jurata Promiſſio de re illicita, aut naturalitur aut divina interdic- " tione aut etiam humana; * * * imo etiam ſi res quæ promittitur, " non ſit illicita, ſed majus bonum morale impediens: ſic quoque " non valebit Jus-jurandum; quia, ſcilicet profectum in bono, Deo " debemus, ita ut ejus libertatem eripere nobis ipſis non valeamus."

A Covenant of this kind does not only hinder a greater moral and ſocial Good, it does not only interfere and check that " Profectum in bono," which we owe to God and our Country, but it tends to Evil and to the promoting of Licentiouſneſs; it tends to Depopulation, the greateſt of all political Sins: it is a Contract, " vergens ad publicam perniciem," and therefore has a moral turpitude in it.

Will the Law of this Country, the perfection of human reaſon, enforce ſuch a Contract? Is a Covenant to omit moral Duties, which, for the exerciſe of our virtues, are left to our free choice, the proper Subject-matter of an Action?

Laws are the Will of the whole Community, and one great part of their function is to enforce the performance of Contracts; but could it even be the Will of any Community to give an effect to Agreements ſubverſive of any moral or ſocial Duty; and, inſtead of meliorating and perfecting human nature, countenance and ſanctify a Contract founded in the corruption and depravation of it?

And it is much worſe than a Covenant of perpetual Chaſtity, which extends to all unlawful as well as lawful intercourſe: for this Covenant only interdicts the innocent gratification of a natural appetite, and leaves the Party at liberty to a criminal indulgence of it. To entertain an Action for the breach of ſuch Contracts, would be ſetting the Laws of God and man at variance with one another: it would be

making the Common Law counteract its own favourite dominant principle, "Salus populi ſuprema Lex."

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The increaſe of the People in ſuch a commercial State as ours, where our foreign Dominions would take, often times, more than we have to ſend them, conduces moſt materially to the ſtrength and proſperity, and conſequently to the ſafety, of the People; and Reaſon, Hiſtory, and Obſervation tell us, that ſuch an Increaſe is beſt ſecured by the medium of Matrimony, which is therefore very truly called, the Seminary of Mankind.

Courts of Juſtice muſt execute the Laws as they find them; but if there is no poſitive written Law, nor any adjudged Caſes, compelling them to apply their Power and Authority in ſupport of ſuch a Contract; as the Law ſtands neuter in reſpect of Matrimony, and many other moral Duties, and leaves it optional to Mankind whether they will perform them or not, we are for leaving the performance of Contracts to omit them equally optional.

It is ſufficient that the Law leaves Matrimony to every man's free choice, and does not puniſh Celibacy: but to effectuate a Contract for the continuing in ſuch a ſtate, is totally inconſiſtent with the Ideas we have of the proper functions of a Court of Juſtice. Activity in ſuch a Caſe, ſeems to be a profanation of Juſtice, and Neutrality the pureſt and moſt refined exertion of it.

I have dwelt a little upon this Argument, becauſe Reaſons drawn from States, where Marriage was a poſitive Duty by the Law of the State, do not apply to this Caſe, where it is not ſo: with the Jews, Greeks, and Romans it was; and therefore Contracts of this kind, with them, muſt be ſo far from being executed by them, that they muſt have been objects of Puniſhment: but we diſclaim all Arguments from thoſe Laws,

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Laws, and therefore we mean to bottom this Judgment upon the Law of God, the principles of Reaſon, Morality, and the Common Law, independent of any other Municipal Law whatever.

I will conſider how the Law of this Country treats Reſtraints upon Marriage; and though no Caſe can be found "in ſpecie" upon this Queſtion, yet a Principle is to be found, which directly applies to and governs it.

The Caſe of Eccleſiaſtics, whether Secular or Religious, was a weed of the Canon Law, erroneouſly tolerated by the Common Law, and totally extirpated at the Reformation.

The Caſe of the Six Clerks in Chancery, is recited by the Act to have been a Cuſtom, not grounded upon any Law at all.

The Caſe of the Fellows of Colleges depends upon the Will of the Founder: there is a Succeſſion in Colleges; it is only a temporary reſtraint on a few in Seminaries of Learning, which are not proper places for the reception of Wives and Children; and the loſs which the Public receives from the Celibacy of a few, is moſt amply compenſated to them by the better accommodating thoſe Seminaries to the purpoſes of Education.

The Caſe of Cuſtoms of Manors, and Limitations of Eſtates during Celibacy, are modifications of Property; and though they do invite the Proprietors of ſuch Eſtates to abſtain from Matrimony, yet they do not profeſs and avow that Intention; as an Eſtate given upon Condition, or an expreſs Agreement, not to marry under a Forfeiture, does; where it figures in the ſhape of a Penalty, and diſcloſes a premeditated deſign to check it.

But whatſoever weight there may be in the Diſtinction between a Limitation and a Condition, it has been long ſettled and ſo often judicially

dicially recognized, that it ought not now to be diſturbed; and it is obſervable, that it is not a ſubtlety of our Law only, for the Civil Law, in the paſſage mentioned at the bar by Mr. Cuſt, out of Swinburn, makes the ſame Diſtinction, and mentions the reaſon for it, which I have given. 4th Part. Ch. 12. Sect. 6. 19. Low againſt Peers.

" Moreover, if the Teſtator do bequeath any Legacy to a Woman " conditionally, if ſhe do not marry, willing her to reſtore the ſame " to another, if ſhe do marry: albeit, in this Caſe, the Woman do " marry, ſhe may obtain the Legacy, neither is ſhe bound to reſtore " the ſame; unleſs it were the meaning of the Teſtator, not to forbid " Marriage, but to grant the uſe of the thing bequeathed until the " Legatary did marry."

" The ninth Limitation is, when the Prohibition of Marriage is " not made conditionally by this word " if;" as " I make thee my " Executor," if " thou doſt not marry," but by other Words, or Ad- " verbs of time; as when the Teſtator willeth that his Daughter, or " Wife, ſhall be Executrix, or ſhall have the uſe of his goods," ſo long " as ſhe ſhall remain unmarried; agreeable hereunto are the " Laws of this Realm of England, wherein there is a Caſe that one " of the Kings of this Realm did grant to his Siſter the Manor of D. " ſo long as ſhe ſhould continue unmarried; and this was admitted to " be a good Limitation in the Law, but not a Condition." Edw. VI. to his Siſter Mary, according to Hen. VIIIth's. Will. (Dyer, 141.)

The Common Law, therefore, in allowing ſuch Limitations, does not diſcover any more favour to Reſtraints upon Matrimony than the Civil Law did; both allowed a Modus as qualifying and limiting the duration of Property, but rejected a Condition.

And

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And it is called a "Modus" by the Writers upon that Law, in contradiſtinction to a Condition; and it was certainly conſidered, by both Laws, like any collateral determination of the Eſtate, or qualification of the Donation: but a Covenant, not to marry under a Penalty, ſtands totally unconnected with any Gift or Eſtate at all; and it is not "lucrum ceſſans," as in the caſe of a Limitation of an Eſtate, but "damnum datum" and Puniſhment. It is laying a Mulct upon himſelf for doing what ancient Policy mulcted him for not doing; the Caſe put, of a Note to pay a ſum of Money upon Marriage, is, upon the face of the Note, only a contingent time of Payment. Some Conſideration muſt be proved, and if, under the pretence and maſk of a fictitious Conſideration, it ſhould appear to be given as a Penalty to reſtrict the giver of the Note from marrying, without any reaſonable ground, foundation, or Conſideration for giving it; I ſhould be apt to ſay as Papinian did, "quod in fraudem legis, ad impediendas nuptias adſcriptum eſt, nullam vim habet."

D. xxxv. de Condit. & Demons. § 79.

A Caſe was cited out of 1 Rolles Abridg. 418. that if a man leaſes for life, upon Condition that if the Leſſee ſhall marry without Licence he ſhall re-enter, it is a good Condition. The Caſe is taken out of the Year Book of 43 Edward III. 6. a. The Caſe itſelf is upon a Cuſtom to pay a Fine by the Tenants of a Manor, holding in Villenage, on the Marriage of their Daughters, and an Iſſue was taken on the Cuſtom: but the paſſage cited, and turned into Rolles, is only, in the Year Book, a dictum of Kirton, a Judge; and he adds, "yet it is a Condition againſt the Common Law;" ſo that, as far as it goes, it is an Authority in point, condemning ſuch Reſtraints. Baker and White, 2 Ver. 215. A Bond from a Widow, not to marry again, was decreed

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decreed to be delivered up, though there was a counter-Bond to pay a Sum of Money to her Executors, if ſhe did not.

All the Caſes cited out of the Books, where deviſes of either real or perſonal Eſtate, made "upon Condition of not marrying without "conſent, with a Deviſe over on non-performance of the Condition," are held to be good, are ſo far from being Prohibitions of Marriage, that they contemplate and have a Marriage in their view, under a proper direction; and though the liberty of Marriage is to be favoured, yet the liberty of diſpoſing of Property as the Owner pleaſes, is likewiſe to be ſupported; and by conſidering theſe Proviſions in Deeds or Wills, not as Prohibitions, but as wiſe Regulations of Marriage, parental Authority, and a free exertion of the rights which property gives, are duly maintained, 1 Mod. 308.; and the Reaſon given by Hale, for ſupporting ſuch conditional Limitations, is, "becauſe the Party is not thereby bound from Marriage." In the Caſe of Harvey and Aſton, Comyns Chief Baron, 729. lays it down, "if a "Portion be given, on Conſideration that a Daughter ſhould never "marry, it ſhould be rejected as repugnant to the original inſtitution "of the Creation of Mankind;" and a Covenant, not to marry any body except a perſon who is not obliged to marry, is to every purpoſe the ſame as a general Reſtraint; and then the principle of public Utility interpoſes, and forbids the ſuſtaining an Action for the infraction of it; and what is ſaid in 2 Shower, 351, The Company of Taylors againſt Clarke, ſeems to be the ſubſtance of every thing which can be ſaid on this ſubject, viz.

"Whatſoever a man may lawfully forbear, that he may oblige "himſelf againſt; except where a third Perſon is wronged, or the "Public is prejudiced by it."

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But the principle of the Judgments upon Bonds to reſtrain Trade generally, or in a particular place, without Conſideration, directly applies to the Caſe and rules it; for every man is at liberty to follow his trade or let it alone. He cannot be compelled to follow it: he may be obliged to maintain himſelf, if able, but quite at liberty as to the Trade or Employment, or kind of Labour.

Mitchell and Reynolds, 1 Peere Will. 181. where the Reſtraint is confined to a particular Place, for a particular Time, and upon Conſideration, the Bond was held good, becauſe the intereſt of the Public is not at all concerned. The indignation of a Judge in Hen. Vth's. time *(a)*, at ſuch a Bond, ſhewed it was criminal in his apprehenſion. And ſurely the intereſt of the Country is more materially concerned, and more fatally affected by this Covenant than by the other.

(a) Vide Mr. Cox's Note, 1 Peer. Will. p. 193.

I ſee great temptations to Contracts of this kind, and the danger of an abuſive application of them. Many virtuous young Ladies, from filial Duty, from a regard to their Parents, from their dependency upon them, and expectations of Fortunes from them, may not chooſe to enter into Contracts of Marriage. Young Gentlemen, in the hands of cunning artful Women, may have firmneſs enough to reſiſt Promiſes of Marriage; but both Ladies and Gentlemen, when preſſed to marry, and apprehenſions are expreſſed of their marrying ſome other, may, and frequently are, induced to promiſe, not to marry any other Perſons but the objects of their preſent Paſſion; and if the Law ſhould not reſcind ſuch Engagements, they would become Priſoners for life, at the will of moſt inexorable Jailors,—diſappointed Lovers.

It is the duty of all Courts of Juſtice to keep their eye ſteadily upon the intereſt of the Public, even in the Adminiſtration of commutative Juſtice; and when they find an Action is founded upon a

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Claim injurious to the Public, and which has a bad tendency, to give it no countenance or aſſiſtance in " foro civili." Upon this principle, turning Proſecutions for Felony into Civil Actions for the things ſtolen, Bonds and Agreements not to proſecute Felonies; and many other Caſes might be cited, which are all governed by that ſuper-eminent and noble Principle, the Care and Protection of the whole Community. And upon that Principle, we think this Covenant, not to marry, unſupported by any Conſideration, is void.

The 2d Queſtion is, Whether there is any Conſideration, appearing upon the face of the Deed; or any foundation for preſuming ſuch a Conſideration, as will ſubſtantiate this Covenant, and give a binding property to it?

It was contended, that a Covenant to marry no other perſon but the Plaintiff, was a Covenant to marry the Plaintiff, and that it was no more than what was implied in every Marriage Contract: and it is certain, that a Covenant to marry the Covenantee, doth carry along with it a Covenant not to marry any one elſe, " expreſſio unius eſt " excluſio alterius;" but the converſe of the Propoſition is not true; for a promiſe to marry no Perſon but the Covenantee, is not a promiſe to marry the Covenantee. It is not a Negative pregnant of an Affirmative Promiſe, but it is a mere Exception out of a Reſtraint, which would otherwiſe have been general; and if the Perſon excepted had been a Stranger, and not the Covenantee, there could not have been a ſhadow of doubt upon the Conſtruction, and yet the Exception muſt have the ſame effect in both; and though it was very properly argued, that Deeds are to be conſtrued according to the Intention of the Parties, yet that Intention muſt not be the child of Fancy and Conjecture, but be collected from the Deed itſelf.

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We are to conſtrue Contracts, which have been made, liberally, to reach the intention of the contracting Parties; but we are not to twiſt and turn Exceptions out of Contracts into Contracts, and make Agreements for Parties, which they have not made for themſelves.

It has been ſaid, that if it is not a Promiſe to marry her, it is a deluſive Promiſe, and the Plaintiff is cheated, becauſe ſhe muſt have conſidered it as a Promiſe to marry her. I ſee no deluſion at all in it: the Words are plain and clear, and it is a deciſive Evidence to me, that the Plaintiff did not mean to take, nor the Defendant to give, a Promiſe of Marriage; becauſe, if they had had any ſuch meaning, they would explicitly have ſaid ſo. Why take ſuch a Circuit to expreſs what five Words would have expreſſed? Why ſubſtitute the Effect and conſequence of a Promiſe of Marriage, in the place of the expreſs Promiſe itſelf?

Reciprocal Promiſes of Marriage were not their intention; but a moſt unequal Agreement, by which the Man is to be bound, and the Woman to be left in a ſtate of perfect liberty as ſhe was before. I am now ſpeaking of the Agreement as meant and underſtood by the Parties; for however the Law may, for very wiſe purpoſes, controul ſuch an Agreement, yet, taking it as they underſtood it, the impoſition is upon the Defendant, and not upon the Plaintiff; for ſhe is left quite a free Agent, and may marry whom ſhe pleaſes with impunity; and at the ſame time, the Defendant, can marry nobody but her, without paying her £. 1,000. She walks through life with him as a Captive in her hand.

He could maintain no Action againſt her on this Deed, for not marrying him. In "aſſumpſit," mutual Promiſes muſt be proved; if by Deed, they muſt be contained in the Deed.

It

It was argued, that if the Defendant PEERS had tendered himſelf in marriage to the Plaintiff, and ſhe had refuſed, that it would have been a Diſcharge, or at leaſt ſufficient to excuſe the Non-performance of the Covenant; and two Caſes were cited, Holcroft and Dickenſon, Carter, 233. and Croſs and Hunt, Carthew, 99. In theſe Caſes there were mutual Promiſes of Marriage; but in this Caſe there are no mutual Promiſes of Marriage, and therefore a Tender and Refuſal in this Caſe, where ſhe was not obliged to marry him, and he was not obliged to marry her, could not operate in Avoidance of his Covenant, nor as an excuſe for the Non-performance of it: but if there were any doubt, the Plaintiff herſelf hath reſolved it; for in the Count upon which ſhe has recovered, ſhe only ſays, ſhe was ready and willing to have married the Defendant, of which he had notice; but does not declare upon the Deed, as containing any intrinſic Promiſe of that kind, or as founded upon any extrinſic Promiſe of Marriage from her. She conſiders, and declares upon, the Deed, according to its natural, obvious ſignification, that is, a Covenant not to marry any other Perſon but her, without an intimation of any other Covenant whatſoever in the Deed.

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If there was no Covenant to be found in the Deed from the Defendant to marry her, nor any Covenant from the Plaintiff to marry the Defendant, or even not to marry any other Perſon; the Queſtion then is, whether a Conſideration to ſupport a void Deed is to be preſumed, or, if it is not to be averred and proved? It was argued, and Plowden, 308. cited, that the Law, from the deliberation and ſolemnity which accompanies the Execution of a Deed, preſumes the Conſideration, and delivers the Obligee from the neceſſity of proving it, which muſt be done in Actions upon ſimple Contracts: that Doctrine

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is right, but it applies only to Caſes where the Deed is good upon the face of it. There the will of the Party, who makes the Deed, is a ſufficient Conſideration; as Plowden ſays, " becauſe Promiſes by Words, and parole Contracts, eſcape often from men lightly, eaſily, and without much attention and deliberation, the Law has provided that they ſhall not bind, unleſs there is a Conſideration." The will of the maker of the Deed ſhall be a deciſive Evidence of the will of the Party who executes it; but if that will encounters the Intereſt of the Public, the Deed is condemned, not becauſe the Deed doth not evidence the will of the Maker, but becauſe it evidences a will which the Law controuls and condemns; and I know of no Principle or Caſe, where a Conſideration has been preſumed to ſupport a Deed which is void upon the face of it. The apparent Conſideration muſt be taken to be the only Conſideration, till the contrary is proved. If a preſumption of Conſideration, without Proof, was admiſſible, no Deed could be condemned for its apparent illegality.

But it was argued, that the Defendant, to ouſt the preſumption of a Promiſe from the Plaintiff to marry the Defendant, ſhould have pleaded there was no Promiſe of Marriage from the Plaintiff, and tendered an Iſſue upon it.

If the Deed had been good upon the face of it, it would have been incumbent upon the Defendant to have pleaded the Fact which had avoided it; but it is contrary to all Rules of Pleading and common Senſe, for the Defendant to introduce a Fact to ſupport the Plaintiff's defective Declaration.

If ſuch a Deed is to be propped and bolſtered up by Averments, it is incumbent upon the Party, who would ſupport the Deed, to make them, and not upon the Defendant who contends to avoid it: And

a Plea

a Plea offering an Iſſue, that there was no ſuch Promiſe, would be bad, becauſe it would be traverſing a Fact which is not alledged. Low againſt Peers.

But it is objected there is a Fact alledged in the Declaration, which might have been traverſed, and not being traverſed, muſt be taken to be true, and that the Deed is legitimated by it; viz. "That ſhe was always ready and willing to marry and take the Defendant to Huſband, whilſt he continued unmarried;" but the Plaintiff being ready and willing to marry the Defendant, (ſuppoſing it to be a traverſable matter,) will not have a retroſpective influence, and vary the nature of the Covenant in its original creation.

If it were void when executed, no ſubſequent Conſideration can animate it, and give it a legal exiſtence; for the Plaintiff being ready and willing to marry the Defendant, does not prove a Promiſe to marry him anterior to the Deed, or concomitant with it, which is the point and gift of this Queſtion; and therefore admitting that Fact to be true, nay, admitting it was a ſubſequent Promiſe to marry him, it cannot give a being to the original Deed.

But it is ſaid, the Plaintiff's Acceptance of the Deed, is an evidence of a Counter-promiſe; and that, in practice, out of regard to the modeſty of the Sex, a very little, perhaps ſilence alone, is ſufficient to prove the Woman's Aſſent; but in thoſe Caſes, a Promiſe of Marriage on the Man's ſide is fully proved; and ſo is the Caſe of Croſs and Hunt in Carthew; there was an Acknowledgment under his hand; whereas here is no Promiſe of Marriage on the Man's ſide at all, and therefore it would be moſt abſurd to preſume a Counter-promiſe, where there is no Promiſe on the other ſide: and the Acceptance is really nothing more than evidence of aſſent to the Terms expreſſed in that Deed; and if there had been any ſimilar Deed containing

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taining a Covenant from the Plaintiff, "ejuſdem generis" with the Covenant upon which this Action is founded, it ought to have been averred and proved; and without ſuch a mutual Obligation, as Lord Hardwicke ſaid in Woodhouſe and Shipley, 2 Atk. 535. there is no colour to ſupport it; and we are no more at liberty to preſume a good Conſideration to ſupport a Deed, void upon the face of it, than to preſume a bad Conſideration, to ſhew the nullity of the Deed that is good upon the face of it; they muſt be equally introduced by Averment, and proved in both. In the Caſe of Cheeſman and Nainby, 2 Lord Raymond, 1456. 2 Strange, 739. the Bond was held to be good, becauſe being only to reſtrain Trade in a particular Place, and for a valuable Conſideration appearing upon the face of the Bond; but if that had not appeared, and it had not been averred, it had been void; for a Bond to reſtrain in a particular Place, without Conſideration, is equally bad with a Bond of general Reſtraint; and if this were a Caſe of Preſumption, which it is not, the Record in this Caſe abſolutely forbids any Preſumption of a Promiſe of Marriage by the Plaintiff; for upon the firſt Count, which ſtates the Plaintiff's Promiſe of Marriage to the Defendant, as the Conſideration of a Deed, "in totidem verbis," the Jury have found for the Defendant; ſo that it appears judicially to us, that there was no ſuch Promiſe as we are now deſired to preſume; and therefore the Verdict is ſo far from furniſhing any Preſumption of ſuch a Proof, that it is deciſive againſt ſuch a Preſumption: but if the Count, on which the Verdict is taken, had been the only Count in the Declaration, there would have been no foundation, from the Verdict, to preſume that ſuch a Conſideration was proved: for the extrinſic collateral Conſideration, not being alledged, could not have been given in Evidence in this Count, and

therefore

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therefore the Verdict, confining it to this Count only, can furniſh no ſuch Intendment.

The Plaintiff was apprized of the Defect, and therefore laid the Promiſe of Marriage in the firſt Count, but was not able to prove it. But as the two Counts are to be conſidered diſtinctly, and as if there had been two diſtinct Deeds, we lay no great ſtreſs on the Verdict upon the firſt Count.

As the Deed is void on the face of it, and there is no intrinſic Conſideration, nor any alledged in the ſecond Count; We are all unanimouſly of Opinion, that the Judgment is right, and muſt be Affirmed, and therefore

Let it be AFFIRMED.

IN CHANCERY.

The Great Seal in Commiſſion.

LORDS COMMISSIONERS,

Lord Chief Juſtice WILLES.
Sir SYDNEY STAFFORD SMYTHE.
Sir JOHN EARDLEY WILMOT.

GEORGE SAYER, Doctor in Divinity - - - - - - PLAINTIFF.

WILLIAM MASTERMAN and ELIZABETH SAYER, an Infant, by her Guardian - - - - - - - - - - } DEFENDANTS.

June 1757. Sayer againſt Maſterman. Vide Ambler 344.

THIS *(a)* was a Bill brought by the Plaintiff to compel the Defendant to complete a Purchaſe purſuant to Articles entered into for that purpoſe. The Defendant ſubmitted to perform this Agreement, provided a good Title could be made to the Lands in queſtion by the Plaintiff; and it came before the Court on this Caſe.

EXTON SAYER, being ſeiſed in Fee, by Will, dated 26th of October 1730, all of his own hand-writing, deviſed, inter alia, as follows, viz. "In caſe I die not leaving Iſſue, I do further give and de-

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(a) This is the only Caſe in this Volume, which is not printed from Sir Eardley's own Notes; but being a Caſe of importance, and not fully reported in Ambler, it is inſerted here.

"viſe,

" vife, after the death of my Wife, all my Eſtates or Farms at Tolby, " Stapleton, and Pepperfield, in the County of York, to my Brother " EVERARD SAYER, during the term of his natural life, with a " power for my ſaid Brother to make a Jointure on any woman he " ſhall marry: and after his deceaſe, to ſuch Child or Children as ſhall " lawfully be begotten by him, the Males however to be preferred " before the Females, and they to ſucceed according to their Births: " and in Truſt to preſerve Contingent Remainders from being de- " ſtroyed during the Life of the ſaid EVERARD SAYER, I do give " the ſaid Eſtates and Farms to my Friend Dr. THOMAS RUNDLE: " and after the deceaſe of my ſaid Brother, and on failure of Iſſue as " aforeſaid, I do give the ſaid ſeveral Eſtates and Farms to my Bro- " ther GEORGE SAYER, and the Heirs of his Body, the Males hav- " ing preference as aforeſaid, and ſucceeding according to their " Births; and to preſerve the Contingent Remainders from being " barred during the Life of the ſaid GEORGE, I give the ſame to " the ſaid Dr. RUNDLE: and on failure of Iſſue of the ſaid GEORGE " SAYER, I give the ſaid Eſtates and Farms to my Niece MARY " CRISP, and the Heirs of her Body; and on failure of Iſſue of the " ſaid MARY CRISP, Remainder to my own right Heirs: And after, " I deviſe to my Brother GEORGE SAYER, all my Eſtate, &c. at D. " whether Leaſehold, Copyhold, or Freehold, not before deviſed, " during the term of his natural Life, and to the Heirs of his Body, " the Males having preference according to their reſpective Births; " and to preſerve the Contingent Remainders from being defeated " during the Life of the ſaid GEORGE, I give the ſame to Dr. RUNDLE " in Truſt; and on failure of Iſſue of the ſaid GEORGE, I give to my " Brother EVERARD SAYER the ſame, and to the Heirs of his Body,

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" in order and preference aforeſaid, with a power to make a Jointure " and Leaſes for twenty-one years, at the uſual Rent, to GEORGE " and EVERARD reſpectively; and to preſerve the Contingent Re- " mainders from being defeated, I likewiſe give the ſame to the ſaid " Dr. RUNDLE, during the Life of my ſaid Brother EVERARD; and " after his deceaſe, without Iſſue, the Remainder to MARY CRISP, " and the Heirs of her Body," Remainder in Fee to the right Heirs of the Teſtator.

There was this Clauſe in the Will, " my Pictures to my ſaid Brother GEORGE the uſe of, during his Life, and after his deceaſe, in the manner as it is entailed above."

EVERARD SAYER died in 1731, without Iſſue; Dr. THOMAS RUNDLE was alſo deceaſed, and MARY CRISP was dead without Iſſue; GEORGE SAYER articled for the ſale of the Eſtate included in the firſt Deviſe; and the Queſtion was, whether by the words of this Will, GEORGE SAYER took an Eſtate for Life or in Tail.

Mr. WILBRAHAM and Mr. CLARK argued for Plaintiff, that this was an Eſtate Tail. That this Deviſe was of a legal Eſtate, and in proper technical words, " Heirs of the Body," which always carry an Eſtate Tail. That the Teſtator's Intention muſt be agreeable to the Rules of Law; and though he may deſign to give only an Eſtate for Life, yet if the words will carry an Eſtate Tail, the Court will put that conſtruction upon them, as in the Caſe of Atkyns and Atkyns, Cro. Eliz. 248. which was a Deviſe to S. and the Heirs of his Body, and after his deceaſe to B. the elder Son of S. and the Heirs of his Body, Remainder over. It was there argued that S. had an Eſtate for Life, Remainder to B. as a Purchaſer; but it was held he had an Eſtate Tail, for by the firſt words an expreſs Eſtate Tail was given him,

him, and there are no ſpecial words to correct or alter them, and this ſeems to be a Caſe in point.

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That there was a great difference between Eſtates executory and executed; and that Authorities drawn from Deviſes of Truſt Eſtates, ought to have no weight in the preſent Caſe. That there was a great difference in wording the Deviſes to EVERARD and GEORGE, for there was a power to make a Jointure given to EVERARD, but not to GEORGE; and there was great reaſon to make the diſtinction, the one being an Eſtate in Poſſeſſion, the other in Remainder; and where an Eſtate for Life only was given, a power to make a Jointure was properly given; where an Eſtate Tail was intended, there was no neceſſity for it; that the words being different, the Teſtator muſt neceſſarily have had a different meaning; and this was the ground of Lord Hale's determination in King and Melling, 1ſt Vent. 214. 225. That the Limitation being to Dr. RUNDLE for the Life only of GEORGE, and he being dead, there was an end of his Eſtate, which would be ſubject to Occupancy, and could not go in Succeſſion: that the power to make a Jointure or Leaſes, could not reſtrain this to an Eſtate for Life, according to King and Melling; nor the inſertion of Truſtees to preſerve Contingent Remainders. Bale and Coleman, 1 Peere Will. 142. That a Deviſe to one for Life, and after his deceaſe to his Children, if he has no Children living at the time, is an Eſtate Tail. Ellen and Alcock, 2 Freeman's Reports, 186. Sonday's Caſe, 9 Co. 127. That there being an expreſs Eſtate Tail deviſed, it ought not to be controuled by doubtful ſubſequent words.

Mr. Attorney and Mr. Solicitor General argued, That this was only an Eſtate for Life in GEORGE SAYER; that the principal rule in the conſtruction of Wills, was to find out the Teſtator's Intention; that

if

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if the Teſtator's Intention appear certain and manifeſt, the Court will give it effect, notwithſtanding any inaccuracy of expreſſion; and for this was cited the Caſe of Counden and Clark. Hob. 29. Cole and Rawlinſon, Salk. 234. As to the Caſe of Atkyns and Atkyns, Cro. Eliz. 248. it does not prove the contrary; for there was no clear and certain Intention appearing, and therefore where there was ambiguity and doubt, the Law muſt take place. That if this ſtood merely upon the Deviſe to GEORGE SAYER himſelf, there would be no difficulty, becauſe it is expreſſed in proper technical words; but we are to conſider whether there is not any thing in any other parts of the Will to ſhew the Teſtator intended him an Eſtate for Life only; for all the words muſt have a meaning, if they are capable of having a conſtruction upon them. To give GEORGE SAYER an Eſtate Tail, you muſt entirely reject the Deviſe to Dr. RUNDLE, to preſerve Contingent Remainders, and theſe words muſt have no meaning at all, and this would be contrary to a principal rule of conſtruction. In ſo ſerious an act as making a Will, and where the ſame is all of the Teſtor's writing, it cannot be ſuppoſed he would make uſe of any words without having an idea annexed to them. They rely on the words to GEORGE SAYER, and the Heirs of his Body; but theſe are not all the words; his Intent can never be collected from part only, and the ſentence is not completed till after the limitation to Dr. RUNDLE; and the rule of conſtruction is, to take the whole of the Inſtrument together, and not to collect the meaning from any particular part; that the Court would tranſpoſe the words to anſwer the Teſtator's Intent. Salk. 236. Duncomb and Duncomb—Coulſon and Coulſon, vol. ii. Eq. Caſes Abr. 318.

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That this was a new Queſtion, and there were no Authorities in point, though ſome came very near the preſent; and what was wanting in ſome Authorities, was made up by other Caſes. If this had been the Deviſe of a Truſt, then the Caſe of Bagſhaw and Spencer would have determined it, but the difficulty ariſes from conſidering it is a Deviſe of a legal Eſtate: if this is to be conſidered upon the foot of Duncomb and Duncomb, and Coulſon and Coulſon, in which Caſes the Court held that the Eſtate for Life ſubſiſted in the firſt taker, with a Remainder in Tail after the Eſtate to the Truſtees, to preſerve, &c. and that the Eſtate for Life was not merged; if this ſhould be thought the ſame Caſe, then GEORGE SAYER will be as much enabled to bar his Iſſue, as if he had an Eſtate Tail executed; for by a Recovery he may bar the Iſſue, becauſe the Vouchee comes in of all his right, as Cuppledike's Caſe, 3 Co. Reports.

To conſider this Caſe, 1ſt, upon the reaſon of the Caſes and Authorities in Law, before the Caſes of Duncomb and Duncomb, and Coulſon and Coulſon. 2dly. How the Caſe ſtands ſince thoſe Caſes, and how this is diſtinguiſhable from them.

The Caſe of Luxford and Check, 1 Eq. Ca. Abr. 179. is a clear Caſe, and ſhews that the Court can tranſpoſe words to anſwer the Intent of the Parties; and ſo would place the Limitation to Truſtees, to preſerve, &c. before the Limitation to the Child and Children of EVERARD SAYER. In the Clauſe in this Will relating to the Family Pictures, the word "entailed," plainly ſhews the Teſtator intended a ſtrict Settlement. In the firſt part of the Will, it is an expreſs Deviſe to EVERARD SAYER for Life, with a Limitation to his Child and Children, which in a legal ſenſe would be only an Eſtate for Life. Then there is an Eſtate for Life to GEORGE, Remainder to the Heirs

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of his Body, Remainder to Dr. RUNDLE, during the Life of GEORGE, in Truſt to preſerve Contingent Remainders; which words explain the Teſtator's Intention, as does alſo the Clauſe that relates to the Succeſſion; and certainly the Teſtator intended, when the Eſtate came into poſſeſſion, to do equal juſtice to both the Brothers. As to the Limitation in Truſt to preſerve, &c. the Teſtator clearly intended to give the Truſtee a power to enter for the Forfeiture, and this ſhould be a Limitation to the Truſtee in Fee; for otherwiſe his Intention could not be anſwered. See the Caſe of Shaw and Weigh, 1 Eq. Ca. Abr. 184. The Powers given in the Will of making a Jointure and Leaſes, though not of themſelves ſufficient to convert an Eſtate Tail into an Eſtate for Life, yet they are material with the other circumſtances, and "juncti juvant." It has been a long doubt, whether the Teſtator's Intention, or the legal ſenſe of the words, ſhould prevail; ſome Judges have thought one way and ſome another: but it now ſeems ſettled, that the Intention ought to prevail; indeed an Intention manifeſtly againſt the Rules of Law ſhall not prevail, as when a Fee is limited upon a Fee, or a Deviſe of a term for years, for a longer time than the Law admits of; but the difficulty is, where there is an expreſs Eſtate for Life, Remainder to the Heirs of the Body. In a Deed, theſe would be conſidered as words of Limitation, but in a Will are words of Purchaſe.

That the words "Iſſue, Child and Children, Son," ſhall be words of Limitation in a Will, though otherwiſe in a Deed. Where it is in equilibrio, what the Teſtator intended, the legal ſenſe ſhall prevail. In the Caſe of Papillon and Voice, 2 P. Will. 471. Sir Joſeph Jekyl was of opinion, that where there is a Limitation to Truſtees to preſerve, &c. and the next Limitation is to the Heirs of the Body, they are to

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be conſidered as words of Purchaſe; and it is ſtronger in the preſent Caſe, by reaſon of the Limitation to the Child and Children of EVERARD SAYER. Shall the legal conſtruction in reſpect to one Deviſe follow the Intent, and the Intent follow the legal conſtruction in the other? If EVERARD SAYER is to take in poſſeſſion only an Eſtate for Life, Remainder to his Children by purchaſe, why ſhould not GEORGE SAYER, the younger Brother, do the ſame?

As to the Queſtion, ſince the Caſes of Duncomb and Duncomb, and Coulſon and Coulſon, this Caſe is plainly diſtinguiſhable from thoſe two Caſes: though this may not be the Caſe of a Truſt executory, where the Parties are to come into a Court of Equity for a Conveyance, yet there are words in this Caſe ſtronger than in the Caſe of Bagſhaw and Spencer.

Here are words of ſtrict ſucceſſion, "the Males are to be preferred before the Females," which words are not in the Caſe of Coulſon and Coulſon; ſo the words "to the Child and Children" of EVERARD SAYER, are not in that Caſe; and therefore this is clearly diſtinguiſhed from that Caſe: But the Authority of Coulſon and Coulſon has been much doubted; and if the principles of that Caſe are doubted, the Court will be aſtute in finding out a difference between that and the preſent. The Caſe of Bagſhaw and Spencer was determined upon the foot of its being an executory Truſt; and the Limitation to the Truſtees to preſerve, &c. in the preſent Caſe, is a ſtrong evidence of the Teſtator's Intention, that this ſhould go in ſtrict Settlement: where the Court is to direct a Conveyance, they will never direct it to Truſtees to preſerve, &c. and inſert no Contingent Remainder afterwards to be preſerved. If the words "Truſtees to preſerve, &c." are not inſerted, the Teſtator's Intention is not com-

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plied with; and therefore Lord Hardwicke ſaid, in the Caſe of Bagſhaw and Spencer, "If I muſt depart from the words of the Will, "I will depart from them to carry the Intention of the Teſtator into "execution, and not to defeat it." The Caſe of Liſle and Gray, Sir T. Jones, 114, reported alſo in Pollexfen, and Sir T. Raymond, is a very ſtrong Caſe, ariſing upon a Deed.

Here is a ſucceſſion pointed at, which makes it like the Caſe of Liſle and Gray: And what the preſent Caſe wants of being like Liſle and Gray, is ſupplied by the Caſe of Bagſhaw and Spencer, and theſe two Caſes taken together, ought to rule and govern the preſent.

Lord Commiſſioner WILLES:

As I have not been able to look particularly into all the Caſes cited, if I had any doubt, I ſhould have deſired time to have conſidered of the Caſe; but I take it to be a very clear one. The Queſtion is no more than this, Whether the Plaintiff Dr. SAYER can make a good Title to this Eſtate? and upon this ariſes another Queſtion, whether by this Will he took an Eſtate for Life or in Tail? In reſpect to all legal Deviſes, Courts of Equity muſt determine in the ſame manner as Courts of Law would do, and are bound to do ſo; nor can Courts of Equity go ſo far, in the Caſe of Wills, as in the caſe of Articles and executory Truſts: for in reſpect of Wills, they are bounded and limited to determine according to Law; whereas in Articles and Truſts, Conſcience is to be the Judge, and they may determine as they pleaſe.

The word "Eſtate," in this Will, muſt mean the Lands themſelves, and not the intereſt in the Lands. I agree with the principles that have

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have been laid down, that in the conſtruction of Wills, all the words of the Will are to be taken together, and that the Intention of the Teſtator ſhall take place, if not contrary to the rules of Law.

Yet the Determinations ſeem now to have gone ſomething further; that if it was manifeſt and plain the Teſtator intended otherwiſe, his Intention ſhall controul the legal ſenſe: but if the words are clear and plain in the legal ſenſe, though there are words that imply he might by poſſibility intend otherwiſe, yet theſe words ſhall not controul the legal ſenſe. As to the Eſtate to EVERARD SAYER, in the firſt part of the Deviſe, I do not think this ſo clear, that the Teſtator intended him only an Eſtate for Life; but however I think clearly the Teſtator intended to give a different Eſtate to GEORGE SAYER from what he did to EVERARD: and I think this is founded on good reaſon; for he might not deſign to give the firſt taker a power of barring his ſecond Brother in favour of remote Heirs. If a man makes uſe of different words, he muſt certainly mean a different ſenſe: And this is a rule in the conſtruction of Acts of Parliament, Deeds, and Wills. As to the word, "entailed," in the Clauſe relating to the Pictures, the Argument is ſo weak, I think nothing can be collected from it: it might mean an Eſtate Tail in GEORGE as well as his Son, but I think nothing can be made of it; and as to the words of ſucceſſion, "the Males to be preferred, &c." theſe words will be anſwered as well by giving GEORGE an Eſtate Tail as an Eſtate for Life: and as to the Limitation to Dr. RUNDLE, "in Truſt to preſerve Contingent Remainders;" the Teſtator could only mean an Eſtate for life to him. But it is certain he did not underſtand theſe words, nor the uſe or effect of them; and therefore muſt I controul plain words, that have a legal ſenſe and operation, from doubtful words of the Teſtator,

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which he did not underſtand himſelf. As to all the Caſes that have been cited, there was an expreſs Eſtate for Life given, except in the Caſe of Lowe and Davies, 2 Lord Raymond, 1561: and there the ſubſequent words were held to be explanations of the former, and to correct their legal ſenſe. Where a man gives an Eſtate for Life (if he is not a Lawyer) it is moſt probable his Intention is not to give any greater Eſtate, yet the Law will give the firſt taker an Eſtate Tail, if the ſubſequent words will extend to enlarge his Eſtate; therefore the Teſtator's Intention muſt be conſiſtent with the Rules of Law.

Lord Commiſſioner SMYTHE:

As to the Deviſe to EVERARD SAYER, I think it is to be laid out of the Caſe now; though even there I think there are very ſtrong words of implication to carry an Eſtate Tail: but in the Deviſe to Dr. SAYER, there are ſtrong technical words; and in all the Caſes where Eſtates Tail have been narrowed to Eſtates for Life, there was a clear and manifeſt Intention of the Teſtator. Where there is a Limitation for Life, with ſeveral intermediate Limitations, Remainder to the right Heirs of the Body of the firſt taker, theſe will be words of Limitation, and not of Purchaſe, and will carry an Eſtate Tail, though not executed: and as to the Limitation to a Truſtee for Life, "to preſerve Contingent Remainders," it is the ſame thing as if there had been ſuch Limitation to any other perſon for Life, for this would only have poſtponed the execution of the Eſtate Tail. As to the words, "the Males having preference, &c." theſe are no more than the Law would imply, and therefore, "expreſſio eorum quæ tacita "inſunt, nihil operatur;" and to this point, is the Caſe of Legate and Sewell,

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Sewell, 1 P. Will. 87. where there were ſtrong words of ſucceſſion, viz. "ſeverally and ſucceſſively as they ſhould be in priority of Birth, &c." and yet it was held to be an Eſtate Tail by three Judges, againſt Mr. J. Tracey. Papillon and Voyce, 2 P. Wms. 471. where A. deviſed Lands to B. for Life, without Waſte; and from and after the determination of that Eſtate, to Truſtees and their Heirs, during the Life of B. to preſerve Contingent Remainders, Remainder to the Heirs of the Body of B. Remainder over; this was held to be an Eſtate Tail by Lord King, and this Determination hath been greatly applauded; and yet here were ſtrong circumſtances of the Teſtator's Intention, that B. ſhould have only an Eſtate for Life. In King and Melling, 1 Vent. 225. Lands were deviſed to A. for Life, and after his deceaſe, to the Iſſue of the Body of A. by a ſecond Wife, with a power to A. to make a Jointure. Lord Chief Juſtice Hale held this to be an Eſtate Tail in A. and his Opinion was affirmed in the Exchequer Chamber, and yet here were ſtrong circumſtances to ſhew the Teſtator intended only an Eſtate for Life; for there was not only an expreſs Eſtate for Life given with a power to make a Jointure, but the Remainder was to the Iſſue of the Body of A. which was an Eſtate Tail by implication; and the ſame words in a Deed would not have made an Eſtate Tail. Shaw and Weigh, 1 Eq. Ca. Abr. 184. which was alſo held an Eſtate Tail. Langley and Baldwin, ditto, 185. There was an expreſs Eſtate for Life to J. S. without Waſte, with a power to limit a Jointure, Remainder to the firſt Son, and ſo to the ſixth; and then deviſed, that if J. S. the Grandchild ſhould die without Iſſue Male, Remainder over; it was held that J. S. took an Eſtate Tail. The beſt uſe of Caſes is to draw ſettled rules and principles from them: now theſe prove, that where there is an expreſs Eſtate for

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for Life, it ſhall be enlarged by implication; and where there is a Limitation to the Heirs of the Body, after an Eſtate of Freehold, this will enlarge an Eſtate for Life to an Eſtate Tail, as well in the Caſe of a Will as a Deed; and therefore I am clearly of Opinion in this Caſe, that GEORGE SAYER took an Eſtate Tail.

Lord Commiſſioner WILMOT:

The Queſtion upon the conſtruction of Wills, whether a perſon takes an Eſtate for Life or in Tail, has been very much agitated, and yet remains ſo much undetermined, that Counſel muſt ſtill find it very difficult to give an Opinion that can be depended upon; and I think it would have been of great ſervice to the public, and tended to render property leſs precarious and uncertain, if the legal conſtruction of words in a Will had never been departed from; for it muſt be much better, that every perſon's Intent ſhould be ſubſervient to the Rules of Law, than that the Law ſhould be ſubſervient to the parties Intent.

There are two Queſtions ariſe in this Caſe, firſt, whether the Inheritance veſted in Dr. RUNDLE the Truſtee, to preſerve Contingent Remainders? 2dly, Whether GEORGE SAYER took an Eſtate for Life, or an Eſtate Tail in Remainder? for if he took an Eſtate Tail in Remainder, he, having now levied a Fine, can make a good Title to a Purchaſer, and we muſt decree the Articles to be carried into execution.

As to the firſt point—Upon the opening, I thought this a very material thing to be made out, for if it did, it would have been the Caſe of Bagſhaw and Spencer; but I think it is very clear the Inheritance was not veſted in Dr. RUNDLE, for the Teſtator never diſtinguiſhed the

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the legal from the equitable Intereſt in his mind through this whole Will, and it is clear he did not know the meaning, or the uſe and effect of Truſtees to preſerve Contingent Remainders: but I ſuppoſe he had heard that they were made uſe of to keep an Eſtate in a family, and he might conſider them as a Receipt for that purpoſe, however thrown into a Will. If the Deviſe had been to Dr. RUNDLE and his Heirs, during the Life of GEORGE, to preſerve, &c. I ſhould have thought it a deſcendable Freehold, and that the Truſt ſhould have continued and been co-extenſive with the legal Eſtate. As to the word "Eſtate," giving a Fee to Dr. RUNDLE, it is clear it was only deſcriptive of the Lands; for in the firſt part the Teſtator ſays, "my Eſtate and Farms in B." ſo it is clear he did not mean the Intereſt in the Lands, but the Lands themſelves.

The next Queſtion is, whether the Limitation to Truſtees to preſerve Contingent Remainder, will turn the words, "Heirs of the Body," into words of Purchaſe? We are bound to determine this Caſe by the Rules of Law, though ſitting in a Court of Equity, this being a legal Deviſe. In the Caſe of an Executory Truſt, this Court has power to form and mould Eſtates, to anſwer the Intention of Parties; but in the Caſe of a legal Deviſe, we are as much bound to determine by the Rules of Law, as if we were trying an Ejectment at the Aſſizes, or determining upon a ſpecial Verdict in a Court of Law at Weſtminſter Hall.

The Rule certainly is, that the Teſtator's Intention ſhall prevail, if not contrary to the Rules of Law; and I think we might in this Caſe, upon the Authority of Luxford and Cheek, 3 Lev. 125. tranſpoſe the words to anſwer the Intent of the Parties: but if we were to do ſo, it would leave this Caſe under the ſame circumſtances with Coulſon and Coulſon, or not ſo well.

This

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This is a much agitated Queſtion, and it were to be wiſhed ſome certain Rule was found out to judge by; and I think a Rule may be found out and adhered to inviolably, where there is a Deviſe to the Heirs of the Body of a Perſon in the plural number, without words of Limitation ſuperadded: and this Rule is laid down in Shelley's Caſe, Co. Rep. viz. "That wherever an Eſtate is limited, mediately "or immediately, to the Heirs of the Body of a perſon that takes an "Eſtate of Freehold by the ſame Inſtrument, the words, "the Heirs "of the Body," ſhall be words of Limitation and not of Purchaſe." The reaſon of this Rule may now have ceaſed with the abolition of feudal Tenures; for it certainly was introduced to preſerve the Duties to the Lord of the Fee; and I think if this Rule had never been departed from, it would have been better for the public in general, though it might have proved prejudicial to ſome individuals. For it renders property very precarious, that Judges ſhould excruciate themſelves to find out the Teſtator's meaning and intention; and though this has been done in ſome particular Inſtances, I ſhould not be for carrying it one ſtep further. Now there is not one Caſe, except Lowe and Davies, 2 Raym. 1561. which was a Deviſe "to A. for Life, Remainder to the Heirs of his Body, that is to ſay, to his firſt and other Sons;" (and this ſtands upon very particular circumſtances, for here the Teſtator revokes the Deviſe in the ſame breath, and explains what Eſtate he intended to give:)—but there is no one other Caſe, where the words, "Heirs of the Body," in the plural number, without words of Limitation ſuperadded, have been conſtrued words of Purchaſe.

Archer's Caſe, 1 Co. 66. A man deviſed to A. for Life, and after to the "next Heir Male, and the Heirs of the Body of ſuch Heir Male:" this was held an Eſtate for Life in A.; for the words of Limitation are

grafted on the Eſtate of the Heir in the ſingular number, and therefore he ſhall take by Purchaſe.

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Clerk and Day, Cro. Eliz. 313. where one deviſed Lands to his Daughter for Life, and if ſhe married after the Teſtator's deceaſe, and had Heirs of her Body, then "I will, that the Heir, after my Daughter's death, ſhall have the land, and to the Heirs of their Body begotten; and if my Daughter die without Iſſue of her Body begotten," Remainder over: this was held an Eſtate for Life by two Juſtices, againſt the Opinion of Lord Chief Juſtice Popham; but this was alſo to the "Heir" in the ſingular number, with words of Limitation ſuperadded. Liſle and Gray, Sir Thomas Raymond, 278. Lands were limited to A. for Life, Remainder to his firſt and every other Son in Tail Male, and ſo ſeverally and reſpectively to every of the Heirs Male of the Body of A. and the Heirs Male of the Body of ſuch Heirs Male. Here the words "Heirs Male," were underſtood to ſignify "Sons," and to be words of Purchaſe. This is a Limitation in effect in the ſingular number, and there are words of Limitation ſuperadded.

Waker and Snow, Palmer, 359. This was alſo in the ſingular number, and words of Limitation were ſuperadded. There are four Caſes where a Deviſe to the Heir Male in the ſingular number, with words of Limitation ſuperadded, have been held an Eſtate Tail.

Pawſey and Lowdall, 1 Roll. Abr. 626. and Burleigh's Caſe, cited in King and Melling. Dummer and Trollop, Mich. 9 Geo. II. which was a Deviſe to firſt Son in Tail Male, then to ſecond Son for Life, Remainder to his Heirs Male; this was held an Eſtate Tail: alſo Miller and Seagrave, Mich. 10 Geo. I.; which Caſes clearly ſhew, that the words of Limitation ſuperadded have been conſtrued as the operative words. In the Caſe of Papillon and Voyce, there was an

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expreſs Eſtate for Life, and yet Lord King held this to be an Eſtate Tail. In Legate and Sewell, though words of Limitation were ſuperadded, it was held an Eſtate Tail in the firſt taker. James and Richardſon, 1 Vent. 334. Burchett and Durdant, 2 Vent. 311. A man deviſes Lands to A. and his Heirs, during the Life of B. and after the Deceaſe of B. to the Heirs male of the Body of B. now living, B. having one Son then living; by the Deviſe, a Remainder was immediately veſted in the Son. It was alſo determined to be a Truſt not executed. This muſt be a miſtake, for the Statute mentions a Truſt as well as an Uſe; but if they proceed on this, then the firſt taker took no legal Eſtate. Jones, *v.* Lord Saye and Sele, Eq. Ca. Abr. 383. c. 4. A legal Eſtate and an equitable Intereſt, will not conſolidate and unite. As to the Caſe at Bar, I think the Caſes of Duncomb and Duncomb, and Coulſon and Coulſon, rule and determine the preſent. And though the Authority of this laſt Caſe has been doubted, yet I think Lord Hardwicke, in the Caſe of Bagſhaw and Spencer, 1 Vez. 142. rather confirmed its Authority than impeached it: and whilſt theſe Caſes ſtand, they muſt determine the preſent; though I think the preſent a much ſtronger Caſe than either of them, as there was, in both the others, an expreſs Eſtate for Life given.

This is a legal Queſtion, and we muſt determine it according to the Rules of Law; we are bound to do it. The inſerting a Remainder to "Truſtees to preſerve, &c." had a legal operation; for theſe words could prevent the Wife from being endowed. In the preſent Caſe, here is no expreſs Eſtate for Life; it is not given to the Heir in the ſingular number, and there are no words of Limitation ſuperadded.

If the words had been, "Heirs Male," there might have been ſome doubt; but what can be done with the words, "Heirs of the

Body?" Suppoſe there had been three Daughters of GEORGE SAYER; if they are to take by Purchaſe, they muſt be Joint-tenants for Life, with ſeveral Inheritances and Croſs-Remainders to each other. What a confuſion would this introduce! We might do it indeed in an executory Truſt, but we cannot do it in the Deviſe of a legal Eſtate. Suppoſe Truſtees to preſerve Contingent Remainders had been inſerted in the proper place, I do not think it would be by any means clear that the Teſtator did not intend that GEORGE SAYER ſhould not have an Eſtate Tail: I do not believe he knew what he meant by inſerting "Truſtees, &c." how then is it poſſible for us to find it out? And if his Intent had been ever ſo apparent, it muſt be agreeable to the Rules of Law. Suppoſe one deviſes to A. and the Heirs of the Body of A. and ſays, "I declare that the Heirs of the Body "of A. ſhall take by Purchaſe," can the Intent be more manifeſt and expreſs? And yet A. ſhall have an Eſtate Tail; for the Teſtator ſhall not be permitted to controul the legal operation of the words.

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Vide Mr. Hargrave's Law Tracts, 1 vol. p. 562. 572. 3. and Mr. Butler's Co. Litt. p. 376. b.

Therefore, upon the whole, I entirely concur with my Lords Commiſſioners, "That GEORGE SAYER took an Eſtate Tail; and that, "having levied a Fine, he is enabled to make a good Title to a Pur-"chaſer; and that theſe Articles ought to be carried into execu-"tion."

Their Lordſhips ORDER and DECREE accordingly; but do not think fit to give COSTS on either Side.

FINIS.

Luke Hanſard, Printer,
Great Turnſtile, Lincoln's-Inn Fields.

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